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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA, : CRIMINAL NO.:
Plaintiff, : JFM-09-328
vs. :
HARVEY M. NUSBAUM and JACK :
W. STOLLOF, : Baltimore, Maryland
Defendants. : November 13th, 2009

* * * * *

The above-entitled case came on for motions hearing
before the Honorable J. Frederick Motz, United States
District Judge.

* * * * *

A P P E A R A N C E S

For the Government:

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Official Court Reporter

P R O C E E D I N G S

THE COURT: Good morning.

THE CLERK: The matter now pending before this court is criminal docket number JFM-09-0328. United States of America versus Harvey Nusbaum, et al. Seated at counsel table for the Government is Shane Cralle, Matthew Bester, Mark Grundvig, John Terzaken and Nancy McMillen. Seated at counsel table for defendants are Joshua Treem, Nicholas Vitek, Stephanie Gallagher, Paul Sandler and Matthew Esworthy, along with their clients, this matter comes before the Court for a motions hearing.

THE COURT: All right. This is all legal argument Martina, so you're free to stay, you're free to go. There are all kinds of motions pending which we'll go through in due course. I mention -- it would ordinarily be my practice to state at the outset some of my tentative views, but I've actually done that by telephone because government counsel arranged a conference call with all counsel, I think to probably figure out what to work on. And I think on Wednesday I spoke to people and I stated my tentative view.

Like I said, everybody would have to be prepared to argue everything, but one issue which seems to be a major issue cutting across some of the motions is the joint venture defense. And I let you all know my tentative view was I was really not impressed with the defendant's position

1 because there doesn't seem to be at this point any factual
2 basis for the joint venture defense. I think I used the
3 adjective silly, but I think that was an overstatement.

4 But the -- but I guess I need to hear from the
5 defendant as to, you know, as of -- you know, it seems to me
6 what the defendants are -- I mean, I will put it bluntly, it
7 looks like they're accused of bid rigging, that they went
8 through the cases to find out what possible defenses, they
9 found a Supreme Court case that there was a joint venture
10 defense and then said, well, we're going to assert that
11 but -- and we're not going to tell you what the facts are
12 because it's a criminal case, and various things follow from
13 that in terms of the pretrial ruling.

14 And it seems to me the Supreme Court case, there
15 clearly was a joint venture, it was formal, it was
16 established. I don't have anything in front of me now to
17 suggest that there was any kind of joint venture. And I
18 think I'm entitled to know at this point, and the
19 government's entitled to know to flesh that out a little
20 bit. So let me hear about either why I shouldn't be told
21 anything more about the joint venture, if I am told it
22 should only be ex parte or what the basis is.

23 Mr. Sandler?

24 MR. SANDLER: Thank you. Good morning again, Your
25 Honor.

1 THE COURT: Good morning.

2 MR. SANDLER: As always I appreciate the Court's
3 candor and assistance to counsel, because during our
4 telephone conversation, when you expressed your tentative
5 view and pointed out that there would still be argument,
6 although an uphill battle, I welcome the challenge because I
7 think this is an important issue. And a matter that
8 hopefully when I conclude you will at least say that the
9 matter was meritorious to present. Even --

10 THE COURT: I have no doubt it was meritorious to
11 present.

12 MR. SANDLER: Even if you don't agree. But I'll
13 set the stage this way, although I will comment when you did
14 schedule today's argument I didn't check any calendar and
15 appreciate that it was Friday the 13th. And then I checked
16 the docket for the trial and I see that the Ides of March is
17 maybe in the middle of our trial. And since I'm very
18 superstitious it doesn't necessarily auger well for me.

19 THE COURT: Well, it could be against the
20 Government, I don't know.

21 MR. SANDLER: I don't think so. But let me
22 explain to you what I really think this is all about. It
23 all started when we were in your chambers and you asked how
24 long the trial would take. Government said one time period,
25 I said another. And you said why. And I said because we

1 have expert witnesses. And you said what will they say.
2 And I said with due respect let's wait till trial. And you
3 said, well, let's tee this up because I want to find out
4 what's going on. And you asked me to proffer areas of the
5 expert's testimony, which I did.

6 I also took a further step in alerting the Court
7 and counsel to what I thought was a valid and appropriate,
8 which you'll see in a few minutes, defense. And then which
9 was the single entity defense, that if we do go to trial and
10 if the government meets its burden and if we put on a
11 defense, the defense was, in truth, factually and legally,
12 that the relationship of the parties, being that of a single
13 entity, joint venture, made the defendants not susceptible
14 to antitrust bid rigging. And then we waited and the
15 Government --

16 THE COURT: Let's -- I understand, at least would
17 be the rule of reason and not a per se violation--

18 MR. SANDLER: I could not hear.

19 THE COURT: I'm sorry maybe -- it would still be
20 subjectively a rule of reason, well, actually maybe not.

21 MR. SANDLER: Maybe not. The analysis could go
22 either way. Now, it's not as if, and I appreciate the
23 suggestion that maybe counsel, as a defense attorney, in the
24 many criminal cases you hear, where obviously when many
25 cases come before you some instances a lawyer might look in

1 a book and say, hey, let's try this. But I'm going to prove
2 to you unequivocally that that didn't happen. But I do want
3 to set the stage and talk to you with pure reason. Pure
4 logic, deductive analysis. I would like to present to you
5 the reason you should allow the defendants to put on
6 evidence of a joint venture is deductively analyzed and
7 conclusively valid.

8 First a major premise. If you accept under the
9 law that a single unit entity, if valid, has a valid defense
10 to a bid rigging case under the Sherman Act, if you accept
11 that, then the minor premise in this case is whether the
12 defendants here are a valid single unit entity. If so, the
13 inescapable conclusion is that they are not susceptible to
14 an antitrust bid rigging case under applicable law. It's
15 more than just *Dagher*. And of course *Dagher* can be
16 distinguished, why? Because *Dagher* under the FTC was a
17 known indisputable joint venture.

18 But there are other cases besides *Dagher*. First
19 *Copperweld* started the precedent. And then as you know, the
20 *Needle* case is very much at issue in terms of not the single
21 unit entity defense, but whether the NFL can get all its
22 groups -- franchises together and say we're going to use one
23 vendor, where a jealous vendor claims, wow, this isn't
24 right, this is a violation of antitrust. And the NFL says,
25 wait, we're a single unit entity. Now, the government as

1 you know, from our briefing, is involved in that case. And
2 the government in its -- never disavows the single unit
3 entity theory, not at all.

4 And the cases that I cited, you know, before you
5 in our brief all recognize that the single unit entity is
6 correct. And even discuss how the defendant has a right to
7 present evidence. And it's a fact specific issue. And
8 those cases are --

9 THE COURT: What are the facts here? What
10 facts --

11 MR. SANDLER: Okay. Now, I'm --

12 THE COURT: I don't have to -- I mean, it's like
13 entrapment, you don't -- I have an obligation not to present
14 to the jury defenses that have no factual basis. So I need
15 to know -- I mean, I just have no idea what the --

16 MR. SANDLER: Of course you don't, because it was
17 not my understanding that it was, A, required at that
18 juncture, before now to present facts. Also, it's a very
19 delicate situation, because I hope you respectfully
20 appreciate -- in one way this is a case of first impression,
21 because here there are very -- other than in the civil law
22 realm, there are no criminal cases, or maybe there's the
23 *Brinkley* case and *Romer* they only touch upon it, but there's
24 really no book -- speaking of books to turn to, that you can
25 gain a way to proceed. I can say that the trial is in

1 March. This is a -- Mr. Nusbaum is a defendant, as is Mr.
2 Stollof. It's very awkward to be able to convey the factual
3 defense on the merits so early in --

4 THE COURT: It's not early. It's not early. The
5 criminal law is not like the civil law. I mean, the facts
6 are the facts. I've got to plan my trial schedule. And as
7 I said before, the length of trial is going to be much
8 determined by whether or not expert testimony about -- and I
9 need to know. And because I have an obligation not to
10 present to the jury --

11 MR. SANDLER: I'm ready to present the facts.

12 THE COURT: Okay. Good.

13 MR. SANDLER: And I would ask this one
14 consideration, some of the facts I might touch upon would be
15 considered privileged, confidential or grand jury
16 information and I either -- I would like the Court to
17 approve my using them at this time if I must.

18 THE COURT: Sure.

19 MR. SANDLER: Thank you. And, finally, I'd like
20 to say to the Court respectfully, that I respectfully object
21 to being required to present the facts in open court without
22 -- without an ex parte opportunity, and I point out that I
23 understand your ruling, but I want to make the record,
24 because counsel have been criticized in some of the cases
25 for not seeking an ex parte opportunity.

1 THE COURT: No, obviously you have your objection
2 to that. And it's fine. It's good to make the record on
3 it. But I -- all I want is a proffer.

4 MR. SANDLER: In sharing the facts with Your Honor
5 I would like --

6 THE COURT: And let me just say, and I am just
7 generally uncomfortable with ex parte proceedings generally
8 because I --

9 MR. SANDLER: I understand.

10 THE COURT: Because I believe in the adversary
11 process. It's not that I want you to have to divulge
12 things, but I just couldn't do my job without having the
13 government being able to respond to your proffer. But you
14 made your record and you should.

15 MR. SANDLER: Thank you. Now, I will also
16 introduce at the proper time a book with probably what I
17 consider a half a pound of facts. Maybe I need a pound to
18 persuade you, but I ask you to consider the threshold burden
19 that I have in making this proffer. For example, I do not
20 believe under the case law I need show more than a very
21 minimal predicate to go forward with the defense. And I ask
22 you also respectfully, very respectfully, to consider
23 viewing the facts I give you in the best light of the
24 defendant. And not interpret it as a ground of
25 cross-examination or counter argument to show why those

1 facts are not valid, or that it's not credible, or that the
2 government has counter facts. Because that would obviously
3 result in any case where a defendant presents facts in this
4 controversial case that brings so many good, talented
5 lawyers from the government here, it's naturally going to be
6 controversial. So let me start with the facts.

7 THE COURT: It looks pretty equal on both sides.

8 MR. SANDLER: Let me start with the facts. I
9 first would like to acquaint Your Honor in a minute with
10 what we're talking about in terms of the bid rigging
11 allegations. The bid rigging allegations come under the
12 context of tax lien auctions, which you may be familiar with
13 in municipalities in Maryland and even elsewhere in the
14 country. When a municipality does not receive taxes or
15 payments of water bills, which facts undisputedly reflect
16 are legion in terms of circumstances. An account receivable
17 is accrued. And annually an auction is conducted to auction
18 off the liens -- it's not actually a lien, but auction off
19 the accounts receivable which in effect becomes a lien, a
20 tax lien.

21 The auctions are variable, so you can't generalize
22 in terms of the nature of these auctions. Some auctions are
23 live where you would raise your hand. The typical auction
24 you would see, you know, in the movies or going to an art
25 auction, that type of thing. Other types of auctions

1 involve sealed bids. Still another version of the auction
2 would involve a computer, electronic. The auction, which is
3 important to appreciate, is for the highest bidder. Not the
4 lowest bidder, it's the highest bidder.

5 And in addition, what's interesting about this
6 type of auction is you may bid -- you do not pay for your
7 negotiable instrument lien, tax lien, you do not pay the
8 amount you bid. You could bid -- the tax lien could be
9 \$1000, you could bid \$15,000. You don't pay \$15,000, you
10 pay the amount of the lien. And you also pay a deposit,
11 which the term of art is called a high bid premium. The
12 high bid premium was instituted around 2000, the year 2000,
13 because some auctions got out of hand where somebody would
14 be bidding \$2 million and they'd pay \$6,000 for a lien.

15 So to curb this runaway situation, legislature has
16 enacted this high bid premium. So that if you bid a certain
17 amount over the assessed value a formula kicks in. And you
18 give a deposit called the high bid premium at the time you
19 pay for your liens. High bid premium is returned. That
20 just generally gives you the idea of the milieu of this
21 auction.

22 So proffer, Mr. Nusbaum and Mr. Stollof were
23 friends and business partners for years, and they were
24 involved together in tax lien auctions. They joined
25 together with what I'll call the Berman group, because of

1 their business relationships. And the way that the
2 relationship developed over the years was that they formed,
3 and Mr. Nusbaum in particular thought, understood, and
4 declared publicly, that he was in partners with Mr. Berman.
5 And he understood this to be a partnership similar to the
6 way he had his relationship with Mr. Stollof, but they
7 formed this larger group.

8 Now, to point out, the first proffer that I wanted
9 to suggest to you, is that the -- when the loans were made
10 to Mr. Nusbaum and Mr. Stollof by the bank, it was Provident
11 Bank, because when they would bid on auctions they would
12 borrow the funds, Provident Bank then was the lender. And
13 Provident Bank would lend large sums of money, could be
14 upwards of \$20 million. And Provident Bank was fully aware
15 of the partnership relationship between the Berman group and
16 the Stollof group. In fact, you will see that the banker,
17 Mr. Gregory John Campanaro, I predict, if I can question him
18 at trial, would corroborate that Provident Bank understood
19 that they were teaming up together, that they were partners,
20 and that they were sharing resources. And I'll get into
21 that. And that that would be an indicia of this joint
22 relationship.

23 THE COURT: Or is it indicia that he's a
24 co-conspirator?

25 MR. SANDLER: Well, you can look at a glass of

1 water and say it's half full or half empty, it's for the
2 jury to decide what the --

3 THE COURT: Maybe so, maybe not.

4 MR. SANDLER: Well, that's my --

5 THE COURT: I understand.

6 MR. SANDLER: Okay. Well, here's the -- can we
7 see this? I'm not sure. Can you read this, Your Honor?

8 THE COURT: Yes.

9 MR. SANDLER: You can scan through to see some of
10 the projected bases of saying that Mr. Nusbaum formed a
11 partnership.

12 THE COURT: Is this from the grand jury?

13 MR. SANDLER: This is a 302.

14 THE COURT: A 302, okay.

15 MR. SANDLER: I can't speak --

16 THE COURT: Okay. That's fine. I assume he's a
17 government witness?

18 MR. SANDLER: I beg your pardon?

19 THE COURT: I assume he's a government witness, is
20 that --

21 MR. SANDLER: I assume. Yes. But that doesn't
22 mean when I cross-examine --

23 THE COURT: No, no, no, I just want to understand
24 the context.

25 MR. SANDLER: What I showed you was a sample. I

1 don't think I need to take you through every document
2 because I'm summarizing. It's more of the same. In
3 essence, this particular witness would testify that he
4 understood, was told that there was a partnership, that they
5 were teaming together, they were sharing liens, that they
6 were sharing information. And of course, the definition of
7 a joint venture, pretty standard in Maryland, and I proffer
8 and have in here excerpts of an expert witness who I would
9 present to the jury to explain what the joint venture is, to
10 explain what the elements of the joint venture, to testify
11 that the observation of the conduct of the parties was
12 consistent with the joint venture, was -- the perfect type
13 of example of a joint venture. He would also point out that
14 parties can be in a joint venture, teaming arrangement if
15 they don't know it.

16 THE COURT: Let me ask on the most fundamental
17 level, what is the difference between joint venture, in your
18 view, and bid rigging?

19 MR. SANDLER: That's a very good question and the
20 answer is supplied by the case law. If the parties get
21 together with the intention to share their profits, to
22 demonstrate by pooling resources together, they can produce
23 economic efficiencies with a procompetitive impact on the
24 market, it is a valid joint venture and is not bid rigging.
25 And I will produce a witness to demonstrate that by

1 virtue -- as I walk through the elements of this joint
2 venture, by virtue of these people working together there
3 was more competition in the market. And I will be able to
4 demonstrate that the economic efficiencies identified by
5 Professor Priest, who's an economist and a professor at
6 Yale, who will testify, and I have excerpts of his report.
7 So you can see this is not just someone who pulled a book
8 out and said, gee, let's do this.

9 And the point that I'm going to make further, with
10 all due respect, is if this were what you -- and I don't
11 blame the Court -- I shouldn't say that, I do not find
12 argument with the Court to for its early assessment that
13 this seems to be something --

14 THE COURT: Well, it does, because it seems to be
15 -- and I don't understand why that doesn't turn antitrust
16 law on its head. There are per se violations. And even --
17 and the whole purpose of the per se rule is, among other
18 things, to prevent evidence about whether -- the defendant
19 thought something was procompetitive. So that -- it seems
20 to me that what you've just proffered is it may be true, but
21 this turns the law on its head. Because the whole idea of a
22 per se violation is you can't do it even if the defendants
23 believe that it's procompetitive to do it.

24 MR. SANDLER: No, I don't think it does at all. I
25 don't think the antitrust law is turned on its head.

1 Although, I have to suggest to the Court that if one reads
2 the commentary and watches this law over the years, there
3 are some individuals who claim that the single entity
4 defense does just that. And some predict a total
5 evisceration of the Sherman Act. But that's not this case,
6 because it's clear if this did not have a procompetitive
7 impact, and if this were not a legitimate teaming agreement,
8 with the economic efficiencies that have to exist, then it
9 doesn't qualify.

10 It's a two-prong test. That's where my confusion
11 came in. I started with the law, the major premise. The
12 minor premise are the facts and the economic efficiencies.
13 I could not, in my view, convince the jury, if I just
14 brought in Professor Booth, my expert on corporate law, who
15 used to teach here at University of Maryland law school
16 now is at Villanova. He would opine as to the elements of a
17 joint venture and talk about those elements in pure
18 corporate law. But that's not enough. I would have to
19 satisfy antitrust requirements. I would have to satisfy,
20 for example, the government's own statement in their policy,
21 which as you saw was very important to this. The government
22 recognizes that there's a single unit entity.

23 Is that -- do I have it right side up, Your Honor?

24 THE COURT: Yeah, I see the headline, is that what
25 I'm supposed --

1 MR. SANDLER: Okay. And then you can see the --
2 this is from the government's own manual. In addition to
3 that, if the Court please, in their own briefing the
4 government acknowledges the single unit entity defense very
5 clearly, which I point out -- which I pointed out to you in
6 my briefing. If you examine the Supreme Court case, the
7 *Needle* case. Which incidentally is going to be argued in
8 mid-January. But it doesn't relate to this case because
9 it's one of those factual cases. Can all the franchisees of
10 the NFL and the NFL be one entity? You know, that's the
11 issue. And that really springs from *Copperweld* which
12 predated *Dagher*.

13 Just look, respectfully, at the quote that I
14 highlight for you from the government about the application
15 of *Dagher* and the single entity concept. So it's a factual
16 issue is what I suggest. And I have case law that says just
17 that, that it would be premature for the Court to say,
18 Counsel, I reject this, you may not defend on this case, you
19 may not try to persuade the fact finder. Could be you, if
20 we waive a jury trial.

21 THE COURT: No, no, it's got to be a two-way
22 street.

23 MR. SANDLER: I'm not -- I am not going to allow
24 you to do this. But look at the decision in the *Gazette*
25 case, which I show you. The proper characterization of a

1 joint venture here would appear to require a fact specific
2 undertaking. The legality of a joint venture will depend on
3 the purpose and nature of the enterprise, the situation of
4 the partners and their place in the market. So we switch,
5 in answering your question about how this differs from any
6 bid rigging case, we move from the facts to the law. And
7 I'll return to the facts.

8 But I want to make sure I'm clear in my answer to
9 the question. That in taking these facts most favorably to
10 the defendant, in the *Ricks* case, our own 4th Circuit
11 clearly says, *United States against Ricks*, in determining
12 this efficiency of the evidence to support a criminal
13 defendant's request for a jury instruction -- I'm not even
14 asking for the instruction at this point, I'm backing away
15 from that rather optimistic approach, retreating to the bare
16 necessity of letting -- asking you to allow me to adduce
17 evidence to show the trier of fact -- but must be taken most
18 favorable to the defendant."

19 Now, if -- to make it very clear, I respectfully
20 suggest, that the answer to your question lies in the proof
21 of the facts, it must be I cannot survive by simply saying,
22 a-ha this is a joint venture, because the joint venture has
23 to have a profile that satisfy the antitrust requirements.
24 It has to have an integrated core purpose whereby joining
25 together there are efficiencies of economy, and those

1 efficiencies of economy must result in a procompetitive
2 impact on the market.

3 And I point out to Your Honor, it is inherently
4 inevitable to our society that a per se criminal case like
5 this would exist any way. That's been litigated before.
6 It's been very troublesome to jurists and lawyers throughout
7 the country. Because here these individuals are being
8 charged allegedly with agreeing to do something in the
9 market and they're not able to show that whatever they did
10 had no harm. They're just, boom, here it is, there they go.
11 And that is an important principle that we must respect,
12 because that's the law.

13 But just as we respect that law, and the Justice
14 Department respects it and urges that it is applicable, we
15 also should respect the Supreme Court's ruling, and the
16 other jurisdictions that have followed it, to allow a fact
17 specific undertaking if I can show sufficient facts. I've
18 only given a little bit of the facts. So I'd like to return
19 to the facts, because they're overwhelming in terms of what
20 I can show. I regret, and once again, I object to my having
21 to go this route, but I have no choice, none whatsoever.

22 THE COURT: You're right.

23 MR. SANDLER: But thank you, Your Honor. Now, I
24 also would point out to you that in the testimony of Mr.
25 Campanaro, the banker that I've just mentioned to you, that

1 I predict what he said, he would also point out that when
2 the monies were loaned to the Nusbaum Stollof group, because
3 each group had its separate financing, which I'll explain,
4 there were reams of paper that constituted loan documents.
5 And in these loan documents there was statements of what the
6 procedure was between the group.

7 And it would say, for example, "Mr. Stollof,
8 Nusbaum here -- I'm not going to mention another name --
9 will join forces this year, as they have done in the past,
10 for the purchase of liens in Baltimore City. After the
11 sale, the purchased liens will be divided between the four
12 individuals with bank financing provided." So the bank loan
13 documents even reflect that Mr. Nusbaum, which the banker
14 said told them that he was a partnering.

15 Another document, which I'm going to submit in
16 this proffer book, "They joined forces this year, as they've
17 done in the past, for purposes of purchasing liens. The
18 borrowing team with Steve Berman," this is Mr. Nusbaum and
19 Stollof, this is the bank document. Dozens of people would
20 have studied and reviewed these documents, because a bank
21 doesn't lend \$20 million on a hand shake. Maybe they did in
22 the 1800s, but they don't today. So bankers and presidents
23 and vice presidents and loan committees all read and studied
24 this. And all understood that this was a partnership, just
25 the way the Stollof and the Nusbaum were together, although

1 there was no writing, there doesn't have to be. In the
2 Stollof and Nusbaum there were writings. But it doesn't
3 have to be writing. Professor Booth will explain that to
4 the jury.

5 Here, another sample: "The borrower team with
6 Steve Berman in 2004 purchase of 807 Baltimore County tax
7 liens totaling \$7 million. The purchase included 11
8 commercial liens for the sole ownership of Mr. Berman
9 because of the time required to allocate the liens between
10 the parties after purchase Provident funded -- shored up the
11 funds." Another example, as in the -- this is from the
12 Provident -- and in the proffer book I have the actual
13 documents, because I don't want the Court to just -- I would
14 like the respect of the Court to honor counsel's word, but I
15 think it's imperative that counsel supply the back up data
16 so the Court has a primary source. But here's a summary,
17 "As in the five Maryland jurisdictions in 2005, the borrower
18 will be partnering with Steve Berman for the purchase of
19 liens." Partnering.

20 And all this is to demonstrate that one of the
21 ingredients, although not a necessary ingredient of a
22 partner, is to intend to do it. And I wanted to emphasize
23 this aspect of the proffer, may it please the Court, to let
24 you think more broadly about your initial reaction, which I
25 know is very difficult to change in any of us, particularly

1 I know that's very difficult to --

2 THE COURT: Summon my wife.

3 MR. SANDLER: -- alter your thinking. But it
4 could not be if I opened a book and said, hmmm, here's an
5 interesting case, let me try to fit the facts here. It
6 wouldn't be consistent with the fact in all these earlier
7 years they were calling themselves partners and they were
8 working together with the bank as partners. That shows you
9 the genuineness of the defense if nothing else, because
10 there's actual data that reflects the partnership prior to
11 this indictment. And I would also suggest to Your Honor
12 that really, in my view, this would be -- should be enough.
13 But this is only one of many factors. And I'm go to
14 proceed. But I want too make sure the Court understands the
15 intent of the parties.

16 Another one, another statement from the
17 Provident Bank records, "Mr.'s Stollof, Nusbaum, Berman will
18 join forces this year as they have done in the past for
19 purchase of liens in Baltimore City and will join forces in
20 Prince George's County." Another statement. This is from
21 another document, all the years, because they spread the
22 indictments from 2002 to 2007, each of these years the
23 Provident Bank records -- so you can see, perhaps I'm
24 getting ahead of myself, but why we wanted some subpoenas
25 from other banks to find more helpful information. But

1 that's for a different argument.

2 As you can see here, or as I'll read to you,
3 "Mr.'s Stollof, Nusbaum, Berman will join forces this year,
4 as they've done in the past, for the purchase of liens in
5 Baltimore City." A lawyer, who's name I will not mention,
6 but is in this document, who represented the bank from time
7 to time, he knew that Nusbaum, Stollof and Berman all shared
8 information on tax liens before the auctions.

9 As you know, the government has a number of
10 witnesses as is traditional. One of the defendants, Mr.
11 Steve Berman, who entered a plea, I predict, and I proffer,
12 and I have back up for this, would acknowledge that -- the
13 aspects of the relationship between the parties. He will
14 even state, I predict and I proffer, and I have back up for
15 and it's in this book, that there was a partnership between
16 the parties. Now, I know that when you hear his testimony,
17 it's going to be very difficult for me now to bring all this
18 out, but I will. I will if I have the opportunity.

19 Now his -- in fairness, the statement I had
20 doesn't say we were partners in every aspect of all these
21 liens, but he acknowledges that he had gone into partnership
22 with Stollof and Nusbaum and in one particular auction in
23 2005 in Baltimore City. And it's in the -- and I've given
24 you the 302 to look at. And after all, I mean, I'm not able
25 to meet with him, I'm having a very difficult time even

1 going this way to show facts, but I can -- I'm going to show
2 you some more.

3 But I want to make a comment which you may find
4 surprising, but nevertheless I feel that I really do want to
5 credit the integrity of the prosecutors in this case. I do
6 not feel that I would have been able to garner all of these
7 favorable facts had they not presented me recently with some
8 information that I still, you know, I filed under my motion.
9 And I wanted to make it clear that this is a very hotly
10 contested case, but it's not a hotly contested case in terms
11 of the lawyers trying to work together, which is why we met
12 and crafted that letter for you trying to move this along.
13 But I do have that evidence. I proffer it. I say it on the
14 record.

15 I say that I have -- I can show intention to be a
16 partner. I can show you that bankers and public people knew
17 that they were partners and teaming together. And by the
18 way a teaming agreement under the law is a joint venture
19 partnership. And under the antitrust law, I respectfully
20 request you to consider, that you do not have to have a
21 joint venture to qualify as a single unit entity. It could
22 be collaborating. It could be teaming, it's called a joint
23 venture. I'm calling it a joint venture because to me
24 that's how it appears to me.

25 And I'm calling in a expert that tells me it is a

1 joint venture. I'm going to call, if you let me, an expert
2 economist who's going to take you and the jury through this
3 to see how, no pun intended, silly the government's case is
4 against these defendants. So I have this proffer about the
5 -- Mr. Berman who would acknowledge. And I will -- I read
6 it to you, and I have the back up for you.

7 I also want to share with you now some of the
8 ingredients that are important to consider in terms of facts
9 that I can show to the jury. And I ask you to give this the
10 best light of the defendant at this juncture, months before
11 trial, in an unprecedented setting where I have to give
12 almost my opening statement for the Government. And you can
13 see they're interested because they're taking copious notes.

14 THE COURT: I suspect they might even order the
15 transcript.

16 MR. SANDLER: So I've covered the intentions of
17 the parties. I've covered how I think the testimony will
18 show this. And I want to talk about now some of the other
19 ingredients which I think will reflect on the antitrust
20 facts of this, namely the core efficiencies, economic
21 efficiencies of how it was productively wise for these
22 individuals to team up, and how it flowed to the benefit of
23 the market.

24 First, one of the crucial --

25 THE COURT: Okay. I just want to make sure that

1 -- and I don't ask this to be argumentative, I'm just -- the
2 facts as proffered, as I understand what they are, is the
3 intention of the parties entering into some kind of
4 agreement, joint venture or teaming. The belief that they,
5 in their minds, that they were procompetitive. And the fact
6 that this partnership was known to a third party, the bank.
7 That is what your proffer of the single entity is, before we
8 get into whether it's procompetitive.

9 MR. SANDLER: No, that's part of it. I have more.

10 THE COURT: I'm sorry, I thought you were --

11 MR. SANDLER: They overlap. You left out also
12 that one of the witnesses, that's a government witness, will
13 acknowledge partnership.

14 THE COURT: No, no, as I say, there's an intent to
15 have a partnership or joint venture or single entity. The
16 belief among the people who are partners, that it is
17 procompetitive, and the fact that this partnership was
18 openly disclosed and known to a third party.

19 MR. SANDLER: And the belief of the banker that it
20 was too, yes.

21 Now, the other aspects would be as follows, and I
22 have to suggest to you that the parties also -- this is a
23 little summary of what I'm going to talk about next, but
24 before I do that, I'd like to emphasize that the parties
25 also, to satisfy some of the elements of traditional

1 partnership or joint venture, shared the profits. They
2 divided equally the liens. And I have some examples in the
3 tab where they do that. Where, in other words, what
4 happened is sometime -- the concept was, of this joint
5 venture, was to pull your resources together, share a lot of
6 information and due diligence, work hard to, in terms of due
7 diligence, carefully analyze and examine the various
8 properties that were available. Had 40,000 liens, it was
9 very complicated. And there was a very arduous task to know
10 what to bid and what not to bid on. They would share that
11 information. And then at the end -- and they would divide
12 up the liens, but they would always make sure, at partners
13 do, that they divided up the liens evenly. There are
14 documents here which I can show you where, for example, Mr.
15 Berman's writing to the attorney, say, for Mr. Stollof,
16 reporting in on his share of liens. In some instances, for
17 example, in Montgomery County where they bid, Mr. Berman got
18 nothing, and Mr. Stollof and Nusbaum would true up and give
19 him his 50 percent, and vice versa. I have that documented
20 here.

21 THE COURT: This is so counter-intuitive, though,
22 since the whole purpose of the bidding, whether it was an
23 auction or sealed bids or whatever, was precisely to prevent
24 this kind of sharing. It just is absolutely
25 counter-intuitive. I mean the whole purpose of having an

1 auction or competitive bidding, either sealed or unsealed,
2 is to prevent competitors from getting together to share
3 exactly and divide up the profits.

4 MR. SANDLER: No, that's not accurate, Your Honor.
5 Many of the partnerships and organizations are in bid
6 rigging traditionally all over the country. In fact, Mr.
7 Nusbaum and Stollof were partners for years just among
8 themselves doing similar --

9 THE COURT: Were they telling the counties they
10 were doing it?

11 MR. SANDLER: Yes.

12 THE COURT: Of course, that's what we get to
13 later, another motion.

14 MR. SANDLER: Yes, but that's part of all -- yes,
15 the answer is yes.

16 Now, in order to -- in order to go forward with
17 this, I would ask you to examine whether minimally
18 sufficient facts come forth where I can show that there was
19 a legitimate joint venture. Then the next question is, can
20 I show minimally that it meets the antitrust guidelines in
21 terms of what is an economic efficiency. And the reason
22 it's not counter-intuitive is this way, first of all, if in
23 this tab -- book, there's a tab 14, which shows the business
24 plan. And I didn't give you the book because I'm going to
25 enter it into evidence if you let me. But I relate as a

1 proffer five or six pages from the report of Mr. Priest,
2 that hopefully will be forthcoming. And what he goes into
3 are all the issues of why, from an antitrust point of view,
4 this is perfectly appropriate.

5 And I would like to, because we're in open court,
6 I would like you to take a moment and read what I give you.
7 And I'd like to give it to the government so that I don't
8 have to show it on the screen.

9 THE COURT: Okay.

10 MR. SANDLER: Is that acceptable?

11 THE COURT: That's fine. But nobody in the back
12 can see the screen any way.

13 MR. SANDLER: Well, I know reporters -- I'm just
14 trying to do what --

15 THE COURT: No, no, I just think as a practical
16 matter there's no screen. I mean, at some point --

17 MR. SANDLER: Okay. Before I put it up on the
18 screen let me say to you as follows, in the other aspect of
19 this venture is the sharing of information. And the
20 information that's shared is very crucial. It's in-depth
21 analysis of what properties are susceptible to these liens.
22 And the individuals would draw upon one another. Mr. Berman
23 would testify that he needed Mr. Stollof's input. He was an
24 expert at this. And they would categorize the properties as
25 to desirable or not desirable, who owned, whether they were

1 owned by banks, whether they were owned by corporations,
2 whether they had a history of paying up quickly, not paying
3 up. That type of information, the location, the locale, all
4 of that was crucial information.

5 They also shared expenses of corporate -- of
6 software programs, which is resources they pulled together
7 because the software programs with a -- contained the
8 strategy and the way that they could prepare their bid books
9 and how they would analyze the properties. And I'm going to
10 move on quickly because I don't want to overstay my welcome,
11 but that's another important point. In addition to sharing
12 the due diligence and sharing computer equipment, they also
13 shared messengers, they shared the profits, as I told you.

14 And they have also the crucial point which going
15 to your counter-intuitive issue, they had the advantage --
16 and here's where part of the procompetitive impact comes --
17 they had the advantage of what I call cross financing. In
18 these tax liens, auctions, if a bidder overbid and didn't
19 have the funds on the spot, he or she, particularly with a
20 high bid premium, he or she would lose everything. And when
21 they had the cross financing opportunity they each could bid
22 more. They each could bid more quickly without being
23 concerned, taking advantage of each other's opportunities to
24 insulate each other from the overbidding, as you will see
25 from some of the examples in the book.

1 So as a result of that, when they were not bidding
2 with each other, there was less competition in the market,
3 which I will demonstrate through an expert who will do a
4 market analysis and present it. So I express to you a
5 proffer of some of the facts that I would produce before a
6 jury in terms of the defense that this is a valid joint
7 venture. I haven't gone to the antitrust issues.

8 But I would be able to show intention. I would be
9 able to show recognition. I would show they acted like
10 partners. I would show they had proprietary interest in
11 joint ownership of computer programs and hardware. I would
12 show they had fiduciary duties to each other with regard to
13 what they were doing. I would show also that they had
14 shared a computer consultant who was crucial. And I would
15 also show you that they shared the profits.

16 And that they shared what I would call the
17 financing, cross financing. They couldn't get joint
18 financing because no bank would loan to all of them for
19 reasons of bank needs of priority. But as you can see in
20 the example I gave you, one bank would help out the other if
21 need be. So those are the proffered facts for a joint
22 venture.

23 Now, as skeptical as you could be, I respectfully
24 request that still sufficient if you look at it in the best
25 light of the defendant to go forward. Now, the jury may

1 take your approach it's ridiculous. You may feel at the end
2 of the day I didn't produce all of the testimony and
3 therefore deny me a jury instruction. That has to -- we
4 have to wait and see. I would have preferred just to try my
5 case, let go -- and put in my evidence and without having
6 this, but the government properly wants to nip their -- nip
7 it in the bud, I'll put it that way, which I don't think is
8 fair, because the truth should come out. And the jury
9 should have a chance to evaluate. This is what they thought
10 they were doing. This is what they did. And it wasn't a
11 cook book defense. You can see this through all the other
12 -- the proffer points that I mentioned. Because this was
13 happening as it was going on.

14 Now, in terms of other characteristics, just to
15 make it clear, so I haven't missed anything, I put up here
16 the intention of the members of the joint venture as
17 corroborated by testimony of witnesses and bank documents.
18 Intense due diligence and shared personal knowledge and
19 information obtained from due diligence, and collective
20 experience relating to tax sales and real estate markets.
21 The joint venture developed proprietary computer programs
22 and software to organize and analyze publicly available --
23 publicly available tax sale auction data and other relevant
24 bidding information.

25 The joint venture shared a common computer expert.

1 The joint venture purchased equipment and services that
2 enhanced bidding efficiency. The joint venture shared
3 messenger services when necessary for delivering sealed bids
4 and other communications to auctions. The joint venture
5 pooled their financial resources and assets together in
6 order to bid on more liens while continuing to submit
7 competitive bids. Remember it's the high bid that wins.
8 And there are thousands of people that can come in and bid.
9 The joint venture did not submit bids under one entity
10 because of restrictive covenants places on the members of
11 the joint venture by the separate lenders. The joint
12 venture randomly divided the liens offered that they
13 intended to bid upon and redistributed the acquired liens to
14 reflect a 50/50 ownership.

15 THE COURT: Let me understand, let's see that --

16 MR. SANDLER: I beg your pardon?

17 THE COURT: The one before that, joint venture did
18 not submit bids under one entity because of the restrictive
19 covenants placed on the members of the joint --

20 MR. SANDLER: That's a mistake, it was under one
21 financing entity. I left the word financing out. In other
22 words, what happened was the banks could not -- the banks
23 would not, testimony would be, lend the joint venture \$40
24 million, because the banks wanted to make sure that they had
25 an opportunity to place first position on their client's

1 lien, on their client's money. That is -- so what they did
2 is they just pool -- they pooled together.

3 Now, that's the facts the way they are in terms of
4 how it emerged. They -- because of the cross financing it
5 was one of their ways that they could bid more because they
6 didn't have to be worried, no one would want to go to an
7 auction and risk overbidding. Now, you say, why would
8 someone overbid and the answer is because if you bid --
9 let's say you bid on a hundred liens, you wouldn't have a
10 hundred liens because many of them are paid up on the spot
11 and many of them are quickly eliminated. So you don't have
12 enough liens for your day. So you would calculate bidding
13 maybe up to your limit of financing or a little more. And
14 sometimes you would miss -- you could miscalculate. But
15 when you have the other opportunity of what I call the cross
16 financing, where the parties could true up, you didn't have
17 that problem. And it led -- you'll hear testimony, led to
18 even more competition.

19 THE COURT: I just don't understand, if it was
20 really a single entity or a joint venture, why didn't they
21 get lending from the financial institutions for the joint
22 venture? It's a simple question, but it's confusing to me.
23 If in fact there was an entity, everybody knew about it, why
24 wasn't the bank's customer the joint entity?

25 MR. SANDLER: Because the bank wanted to have

1 individual names on their record for primary collection.

2 They did not want to have --

3 THE COURT: That doesn't make any sense. I mean,
4 any partnership you can get guarantees, you've got the
5 partners -- under partnership law they're liable. I don't
6 get it.

7 MR. SANDLER: Well, the issue is the first lien
8 would be on the individual, not on the collective entity.
9 That's the way Provident Bank wanted it. We'll have
10 testimony to that effect. But, you know, when you say that
11 there is a troublesome point, I don't find it particularly
12 troublesome.

13 THE COURT: No, I'm -- not troublesome, I'm just
14 confused. I don't understand if there's a single entity,
15 why wouldn't Provident loan money to the single entity. And
16 then -- and we're talking now not liens against the
17 property, we're talking about liens against the property of
18 the partners, the members of the joint venture. I don't
19 understand why if there was a single entity why a lending
20 institution wouldn't -- and everybody was acknowledging this
21 to be a joint venture, why they didn't lend to the joint
22 venture and have the lien against the assets of the joint
23 venture.

24 MR. SANDLER: Because, for several reasons. First
25 of all the bank, the Provident Bank was the bank that

1 traditionally had loaned money to the Stollof and Nusbaum
2 group, and they wanted a first lien on those liens. The
3 Berman group had family funds. And the arrangement with
4 their banking was totally different. And the bank had a
5 limit on how much they would lend on -- in terms of their
6 total loan. If they did it separately they could acquire
7 more funding, but that is -- that's the answer I have. And
8 that's a question that will have --

9 THE COURT: I don't get it. It would seem like in
10 the Supreme Court case, and whatever that joint venture
11 would have made its loans from the financial institution.
12 If it really is a single entity, it would seem to me that it
13 gets its financing as a single entity. I mean, that just
14 seems to me an objective hallmark, if they're not, they're
15 in the a single entity.

16 MR. SANDLER: So what you're saying to me, if they
17 don't have financing from one bank that means they're not a
18 joint venture? I mean, that's what you're saying.

19 THE COURT: No, no, it's just the indicia you're
20 talking about, I don't understand. They're still -- they're
21 getting separate financing in their separate capacities and
22 yet they're a joint venture.

23 MR. SANDLER: Yeah. Yes, Your Honor, because of
24 the nature of the tax liens, the nature of the limits that
25 could be given. If they -- if the bank would -- if one

1 bank, Provident, would give the loan to the joint venture
2 collectively it would be limited, say, \$20 million. And if
3 the join together they had other banking for significant
4 amounts so they would have more money at their resources to
5 buy --

6 THE COURT: They could go to another bank if they
7 need more financing.

8 MR. SANDLER: Well, I don't know. That's fact
9 that may or may not be of interest, but I don't think that's
10 a dispositive issue.

11 THE COURT: No, no, the question is whether
12 they're a joint venture.

13 MR. SANDLER: I'm suggesting to you --

14 THE COURT: Or single entity.

15 MR. SANDLER: Excuse me, I want to back up a
16 second, the question for the jury is whether they're a joint
17 venture.

18 THE COURT: Well, yes and no. The mere fact that
19 there may be factual disputes, I mean, the issue is of
20 public policy in antitrust law, which that's exactly why I
21 have to make a probing analysis before I decide even if
22 there may be a factual dispute, what's a factual dispute as
23 opposed to a issue of law.

24 MR. SANDLER: I would say this to you, it's clear
25 to me that that is an issue that's on your mind. And I

1 would be happy to submit a supplemental memorandum.

2 THE COURT: No, no, keep going, I'm just trying to
3 understand.

4 MR. SANDLER: It's my understanding that the
5 reason there wasn't one massive loan to the entity is
6 because the borrowing patterns of the individuals
7 historically were with their own lending institutions for
8 Nusbaum and Stollof and family for Mr. Berman. It is my
9 understanding that Provident Bank would not let a joint --
10 would not go to the entity because they wanted to have a
11 first lien on their client's lien, the one that he bid on.
12 And that's how they kept track.

13 THE COURT: The one they dealt with historically.

14 MR. SANDLER: That's correct. That's the answer
15 that I have. And I don't --

16 THE COURT: That's fine.

17 MR. SANDLER: Okay. I also wanted to say that
18 they randomly divided the liens, offered on a 50/50 basis.
19 Each group shared control of the venture, including the
20 bidding at the tax lien auctions. And then I wanted to lead
21 into the economic efficiencies that these groups developed
22 were a direct result of the competitive market. And the
23 efficiencies developed allowed members of the joint venture
24 to out bid others for liens they may not have been able to
25 bid upon. And I'm going to talk about these efficiencies,

1 because I'd like to share with you in terms of the antitrust
2 issues some of the writing of the expert. And I really -- I
3 can put it on the screen and let you read through it or I
4 could hand it up and give it to everyone.

5 THE COURT: Which ever you prefer.

6 MR. SANDLER: I prefer to hand it up. I think
7 it's better. Bear with me one second, Your Honor.

8 MS. GALLAGHER: Your Honor, would it be okay if
9 we take a brief bathroom break while everyone's --

10 THE COURT: Sure let's do that. I'll read and let
11 me know, one of you let me know when they're ready.

12 (A recess was taken.)

13 THE COURT: Okay. Timely recess, I could read the
14 materials. Thank you very much, Mr. Sandler.

15 MR. SANDLER: Thank you, Your Honor. I'm coming
16 to a close and I wanted to thank you for your patience.

17 THE COURT: It's my job.

18 MR. SANDLER: But if I may go back to one of your
19 questions about the troublesome question -- or your
20 confusion on the banking, I would proffer some further facts
21 that might help. I understand that based upon thinking
22 about the matter, further learning more information, that
23 essentially the banking situation was very complicated for a
24 number of reasons. The banks would only loan a certain
25 amount, which was \$20 million. That when they had two banks

1 lending each came with \$20 million, so it was \$40 million.

2 In addition to that, the collateral was different
3 and the term of loans were quite different. The Nusbaum
4 group would borrow against the liens and there was a lock
5 box arrangement. Whereas the Berman's group borrowing was
6 not based that way at all. They had their own connections,
7 their own interest rates which were lower or different, and
8 that they borrowed against real estate collateral, that I
9 understand was totally separate. And that explains the
10 financing. And in addition to that, I've asked you to read
11 part of a proffer of Professor Priest.

12 I also have three more points to bring to your
13 attention by way of proffer. I wanted to summarize what we
14 believe the economic efficiencies were of this joint
15 venture, which you'll find in the -- when we hand in the
16 proffer notebook. But the collaboration increased the
17 available information concerning those liens that might
18 possibly be profitable, increasing the dollar magnitude of
19 bids on those tax liens, and increasing the number of tax
20 liens which the joint venture submitted bids. And there's a
21 two-page summary, which I thought to bring to you while you
22 were in conference, but in take talking to counsel we
23 thought best to do it in open court.

24 THE COURT: All right.

25 MR. SANDERS: But I have, for example, a summary

1 of the efficiencies that we've talked about. I'd like to
2 show you that. I'd like to read to you a paragraph of a
3 proffer of the testimony of Professor Booth and then show
4 you two examples of partnering. And then I would conclude.
5 If you could read the market efficiencies.

6 THE COURT: Okay.

7 MR. SANDLER: This was the next part of it.

8 THE COURT: Okay.

9 MR. SANDLER: Now, you see, I respectfully
10 suggest, you really can't proceed with a single entity
11 defense in an antitrust cases if all you're going to show is
12 you had a joint venture. The joint venture has to have
13 certain market impacts and certain efficiencies of economy,
14 which we will prove.

15 I'd like to share with you Professor Booth's
16 comment. It's pages which I put in the proffer book, but in
17 summary.

18 THE COURT: Okay.

19 MR. SANDLER: There were occasions, I proffer,
20 when the joint venture members would in some instances only
21 one would bid for all of them, then they would divide, then
22 sometimes they would bid separately and divide.

23 I would also now conclude by stating as follows:
24 If I must, and I would determine that at trial, I would call
25 my client, Harvey Nusbaum, who would testify under oath as

1 to the nature of his relationship with Mr. Berman, business
2 relationship, as to all of the elements that would
3 constitute the venture as I indicated, and underscore,
4 corroborate it, and testifying about the economic
5 efficiencies. He's not an economist. He's not going to
6 talk in legal terms. But he will tell the jury exactly what
7 they did, how they did it, how they met, why they met, what
8 their goals were, what his intention were in terms of
9 expanding his opportunity and joining forces, and the
10 benefit of that.

11 So I conclude as follows: It's not necessarily a
12 typical case. It's not necessarily every day that you see
13 so many lawyers in this type of case at this stage of a
14 proceeding, when it's not a drug case or some other large
15 public type of matter. The issues are not necessarily
16 frivolous. It's not something that has been contrived just
17 to try to pull something off. It's a defense based on the
18 facts and the law. And what's so daunting to me, Your
19 Honor, is that we're at such a preliminary stage, we're not
20 arguing a case now to a jury. We're suggesting to you as a
21 criminal defendant in this state, in this country, there's a
22 defense that he would like to interpose.

23 If a fact finder thinks it's ridiculous, they will
24 scold him for it. If the fact finder thinks it's
25 applicable, it's not, as the Justice Department said, a jury

1 nullification. I had one little article, I'm sorry I wrote
2 it now, I never thought it would appear in legal pleadings,
3 but nevertheless it wasn't geared to nullification, it was
4 an academic article for something totally different. So
5 what I'm saying to you is, at this stage of the case, please
6 give every benefit of these facts the best light of the
7 defendant so we can prove our defense if we must, interpose
8 what we must.

9 And I suggested to you in my writing that this is
10 not an affirmative defense. The government has the burden
11 of proving that it's not a joint venture or single entity.
12 The case law makes that clear. And I cited that Jack
13 Russell Terrier case. I mean, that's clear. So I'm not
14 trying to be an alchemist. And I suggest to you that as my
15 investigation of the case continues I'll uncover even more
16 facts to corroborate these issues.

17 And I would ask you, if there is a doubt, let me
18 come back one more time with my experts. If I must, I'll
19 give the state free discovery. I'll bring them here. And
20 they can give you and explain to you their opinions as
21 academics and individuals with skilled knowledge in these
22 areas, to tell you not the fact that they have the ultimate
23 say, but that are entitled to testify as to the ultimate
24 issues. Although, I'm not -- I would just ask them legally
25 permissible questions, which they can then ferret these

1 facts and explain to you why, in their opinion, this case is
2 not a bid rigging case.

3 And of course it's easy for the Government to say
4 we recognize that when we put these facts in evidence, if
5 you think about it, and I was kidding counsel during the
6 recess, I saw them smiling at some of my comments, because
7 of course some of the facts that we're going to prove will
8 enhance their own case, it's obvious. But we're not cowards
9 veering from the truth, we're going to tell -- we want the
10 jury to hear exactly what happened, so a fair trial can
11 exist.

12 And, Your Honor, I don't say this at all without
13 the greatest respect, but in my years of trying cases, very
14 similar age we are, we've known each other a long time, I'm
15 senior status, and I haven't -- I've tried criminal cases
16 with much less than this in terms of facts, much less, and
17 have been able to proceed. And if my client were wrong, the
18 good jury told them so. So please let me go to the jury to
19 defend my client --

20 THE COURT: As I understand your position, the
21 case never goes to the jury because they can't prove beyond
22 a reasonable doubt that it's not a joint venture.

23 MR. SANDLER: Well, I'm not sure that's correct.
24 I think it would go to the jury, because I think it would go
25 to the jury on the issue of -- I would get to defend --

1 first of all, in the *Ricks* case and the *Romer* case, I mean
2 the 4th Circuit recognizes this --

3 THE COURT: No, I was just trying to follow the
4 logic of your argument. They've got the burden of proof,
5 and you're going to establish all this in your case, I don't
6 see how it ever goes to the jury.

7 MR. SANDLER: Well, maybe that would be a fact,
8 that would be up for you to decide. I don't think it goes
9 that way, because I think that even under your thinking it's
10 questionable. I mean, they have the right to stand up and
11 say it's a sham. They have the right to say it's I silly.
12 And they have a right to give their argument as to facts.
13 But if you believe that the law says a valid -- if you say
14 to me, Mr. Sandler -- if you say to me Mr. Sandler the
15 predicate on which you operate is invalid, I do not accept
16 under any circumstances that if you have the Holy Ghost of
17 joint ventures before me, you still can't put on a defense
18 because it's not acceptable law. Then I have to bow down
19 and wait for --

20 THE COURT: And appeal.

21 MR. SANDLER: Pardon?

22 THE COURT: May have to bow down and appeal.

23 MR. SANDLER: Well, then I drive down to Richmond
24 and I see another Judge Motz. But any way, my point is that
25 if you believe the major premise is valid, then the question

1 of whether the minor premises is valid is debatable
2 fairly --

3 THE COURT: Okay. I understand your position. I
4 want to make clear, the only thing that I -- I mean, you've
5 made a much more -- I think it was important to have a much
6 more detailed factual -- some kind of factual proffer today,
7 because I had absolutely no idea from the papers what it was
8 you were relying on. So let me hear from Ms. McMillen.

9 MS. McMILLEN: Your Honor, John Terzaken will be
10 arguing for the United States.

11 MR. SANDLER: Before you hear from the government
12 I just object -- may I just put a objection on the record?

13 THE COURT: Sure.

14 MR. SANDLER: I would like to object to the
15 government's comment on the proffer, because at this stage
16 the government's argument against the proffer should not be
17 considered. That's the objection. I know it's overruled.

18 THE COURT: It's overruled. I believe in the
19 adversary process.

20 MR. SANDLER: And finally, Your Honor, at what
21 point may I introduce the proffer book?

22 THE COURT: Right now.

23 MR. SANDLER: Thank you.

24 THE COURT: And I gather it's going to be Mr.
25 Terzaken.

1 MR. TERZAKEN: Yes, Your Honor. Good morning,
2 Your Honor, feels like afternoon already. The United States
3 doesn't disavow the single entity theory, just to make that
4 clear for the record. What we agree with the Court on is
5 that the application of that particular defense in this case
6 would turn the antitrust laws on its head. And it would
7 turn the antitrust laws on its head because, as a factual
8 predicate to any single entity defense, there has to be a
9 showing of a formal pre-existing business relationship
10 between the defendants and all of their alleged
11 co-conspirators. Every single case --

12 THE COURT: Does it have to be in writing?

13 MR. TERZAKEN: It doesn't have to be in writing.
14 There has to be a demonstration that there was a formal
15 agreement. In every single case. Take the *Romer* case for
16 example, there was a formal partnership. The *Copperweld*
17 case, a parent and subsidiary. The *American Needle* case, a
18 franchise case. Every single case where the single entity
19 defense has ever been considered, or in fact proffered, has
20 been a circumstance in which a pre-existing formal business
21 relationship existed.

22 The reason why is because the single entity
23 defense really isn't asking the question about whether the
24 formal business relationship existed. It's a question of
25 whether or not all of the parties to that pre-existing

1 relationship were so integrated in their conduct that they
2 therefore should be considered under the law to be one
3 entity. Those are really two separate questions. The
4 problem here is we never even get to the single entity
5 defense because there is no showing, and can be no showing,
6 by these defendants that all of the alleged co-conspirators
7 in this case were part of a joint venture or partnership,
8 whatever label they choose to put on it.

9 The formal business relationships that have been
10 demonstrated in the cases I mentioned were either in
11 corporate form, in written agreements, or in unchallenged
12 oral agreements, where firm partnerships were represented to
13 other parties. None of those facts exist here. Every fact
14 that's been proffered today is equally consistent with a
15 well-oiled conspiracy as it is with the existence of
16 anything else. And in fact, to clear up any confusion, a
17 number of the facts suggest exactly the contrary to what
18 they've been representing.

19 For example, to clear up the Court's confusion
20 about why these banks didn't lend money to a single entity,
21 because there is no single entity here. We've never once
22 heard the name of this joint venture, where its headquarters
23 are, what its joint bank account number is. The reason why
24 is because there is none. These are two competitors who sat
25 down with the bank trying to get more money. There is no

1 single -- to clear up the confusion about why they didn't
2 submit joint bids as a single entity, they never represented
3 themselves as a single entity in submitting those bids.
4 They submitted those bids as separate independent
5 competitors.

6 Where on the face of that evidence is there any
7 suggestion of a formal business relationship? Instead what
8 the defendants want to do here is call an expert -- who I
9 would put on the record is unqualified yet to testify as an
10 expert in this case -- to suggest that looking at all of
11 these market factors we can assess, after the fact, that
12 this well-oiled conspiracy really could constitute something
13 else, maybe we should call it a joint venture instead. And
14 that's where the antitrust laws get turned on their head.

15 If this was the defense in every antitrust case we
16 would hear this exact defense every time. And in fact the
17 per se rule would no longer exist, in fact bid rigging
18 crimes would no longer exist. The fact that competitors get
19 together and agree, and they do it very well, and it's
20 profitable to them, is exactly why bid rigging is condemned.
21 Because what we're trying to promote here is competition.
22 These folks holding themselves out as independent
23 competitors should be competing not collaborating behind the
24 scenes. It's exactly what the antitrust laws are meant to
25 prevent.

1 So the issue seized here, I think the court has
2 seized on as the appropriate one is really focused on this
3 factual predicate. We can argue at a later time about the
4 efficiencies created, or whether or not there was any
5 integration of other things, use of other people, for
6 example, to help facilitate the conspiracy. All of those
7 things are for a later question. The critical question here
8 is the defendant --

9 THE COURT: When do they become material?

10 MR. TERZAKEN: They don't become material until
11 they establish a factual predicate that a formal business
12 relationship existed. Again, there is no defense here
13 unless a formal business relationship existed. And then the
14 question where experts and testimony about bank accounts and
15 use of people to facilitate their activities, that's when
16 that becomes important. Because then the question is, is
17 this joint venture, if there was such a joint venture, are
18 all of those parties then so integrated that they really
19 were one entity, and therefore, couldn't conspire with each
20 other.

21 Because there's still also the possibility that
22 they can't even meet that second threshold, that is they
23 weren't that integrated and they were simply using the cover
24 of a joint venture as a sham. And this is the law that's
25 very clearly stated in *Palmer* and *Engine Specialties* and

1 Addamax, none of which, contrary to suggestions of the
2 defendants in their papers, has been contradicted by *Dagher*
3 or any of the recent Supreme Court cases. It's still the
4 prevailing law.

5 The issue here is that the defendants, regardless
6 of some of the evidence that they've put forward today, or
7 facts that they have proffered, cannot under any
8 circumstances plausibly demonstrate the factual predicate of
9 a formal business relationship between all of the parties
10 alleged as co-conspirators here. The United States knows
11 this and so do the defendants. We've produced full
12 discovery to them, including all of the 302s of all of the
13 co-conspirators. They also have in their hands the plea
14 agreement of one of those co-conspirators, a co-conspirator
15 who appeared before this court and admitted to rigging bids
16 with these defendants.

17 MR. SANDLER: Objection.

18 THE COURT: Overruled. Whatever --

19 MR. SANDLER: Just for the record.

20 THE COURT: Fine.

21 MR. TERZAKEN: He appeared before this Court, in
22 his factual proffer admitted to rigging bids with these
23 exact defendants on these auctions. Now defense counsel
24 might suggest they can score a few points on
25 cross-examination to try to suggest they can lure out of him

1 that there were parts about the way they contrived this
2 conspiracy that look like a partnership. But what they
3 can't do is controvert the fact that this individual has
4 admitted before this Court, and I suspect very well would
5 admit on the stand, that he conspired with these individuals
6 to rig bids. This wasn't any partnership or any joint
7 venture. It was a bid rigging conspiracy.

8 They're also equally aware of the other
9 co-conspirators alleged in this case, John Rieff, Jay
10 Dackman, they're in possession of their 302s. And in those
11 302s those very same co-conspirators admit to the bid
12 rigging conspiracy with these defendants. They cannot over
13 come that. If all of the defendants to this alleged joint
14 venture didn't participate in it, and instead are admitting
15 to rigging bids, how can a joint venture or formal business
16 relationship ever have existed. It's nonsensical.

17 Going even further, I found it incredibly
18 interesting that it was proffered that Defendant Nusbaum
19 himself might take the stand to suggest there was no bid
20 rigging agreement, because the United States had an
21 opportunity to interview Mr. Nusbaum on multiple occasions.

22 MR. SANDLER: Objection. May we approach the
23 bench?

24 THE COURT: No, let's not go there right now.

25 MR. TERZAKEN: Without getting into the facts

1 behind it, I think the Court is well aware that the United
2 States has firm evidence that any such testimony would be
3 highly questionable from the defendant.

4 On the facts before the Court, that is what has
5 been proffered by the defendant, there is simply no factual
6 basis for them to proceed on the single entity defense.

7 THE COURT: What do you understand does -- what do
8 you understand Mr. Sandler to have said is the indicia of
9 the single entity.

10 MR. TERZAKEN: What I think Mr. Sandler has said
11 is the defendants want to say now, after the fact, that they
12 acted very efficiently with their co-conspirators in rigging
13 these bids. And then he would like to call an expert to get
14 on the stand and say, well, any bid rigging conspiracy is
15 very efficient.

16 THE COURT: But I ask you because I'm not sure I
17 understand, I'll ask him again myself, but it's that they
18 agreed with one another to divide up the work. That can't
19 be it, because every bid rigging is a single entity, that's
20 silly.

21 MR. TERZAKEN: And I said from --

22 THE COURT: Secondly, that they did it because
23 they thought it was procompetitive. That seems to me to
24 absolutely underline, as a matter of law, the per se rule.
25 I mean, you can't -- just because somebody thinks something

1 is procompetitive you don't get to go to the jury
2 essentially just to determine if something is
3 procompetitive. That's what the pro se rule is all about.
4 You can't defend on that basis. Thirdly is because they
5 somehow -- they hired a single computer expert and they
6 pooled their resources to engage in this. And fifth that
7 what they were doing, their teaming arrangement was known to
8 Provident Bank. Did you understand him to say anything
9 else?

10 MR. TERZAKEN: No, I didn't. And in fact --

11 THE COURT: Mr. Sandler, is there any other
12 indicia that this is a joint venture?

13 MR. SANDLER: Yes, Your Honor, all that I covered
14 and all that's in that book.

15 THE COURT: But instead of --

16 MR. SANDLER: I'll summarize --

17 THE COURT: Let me see the forest for the trees in
18 this.

19 MR. SANDLER: I said to you as follows, that the
20 parties intended to be -- the proffer, the parties intended
21 a joint venture. The parties shared that information
22 openly. The parties shared resources and due diligence,
23 which was a crucial fundamental aspect. They shared that
24 work, they pooled that together. They met and they analyzed
25 the research. They decided what they wanted to do, what

1 they didn't want to do. In addition to that, they shared
2 expenses of computer consultants. They shared expenses of
3 hardware and software to support their work. They shared
4 the advantage of what I call the cross financing. In
5 addition to that, they divided equally the profits. I also
6 said to you that there's an expert in Maryland law, and
7 under Maryland --

8 THE COURT: Okay. I understand. Okay. You've
9 given me the facts. That's what I understood. Go ahead.

10 MR. TERZAKEN: And that's the same as the United
11 States understood. And, again, all of those facts, if taken
12 as true to defendant, which we would contradict some of
13 those facts, still don't amount to demonstrating a formal
14 business relationship, a pre-existing formal business
15 relationship between these defendants. For all the reasons
16 that the Court has --

17 THE COURT: The one thing, I'm not sure that it
18 goes to single entity, tell me about as far as the bank who
19 knew all about the teaming arrangement. That does seem to
20 be at least they weren't hiding it from them.

21 MR. TERZAKEN: Well, I'm glad to bring that up,
22 because in terms of clearing up the confusion here, again, I
23 think the Court's questions on this were exactly on point,
24 and that is if there was a single entity here, the bank
25 would have funded the single entity. It is not an

1 explanation simply that these different competitors got
2 money from different banks and held themselves out in
3 meetings that we might partner up with these other
4 individuals during the process.

5 What due diligence was the bank doing to check
6 into that partnership? None. Merely this was a suggestion
7 to the bank as to how this money was going to be used and
8 how they were going to be using it later. The bank wasn't
9 vetting, as was suggested, the existence of a partnership.
10 They didn't need to because they weren't funding that
11 entity. And if that entity really did exist, it would have
12 been funded by the bank.

13 And, furthermore, it would have used those funds
14 as a single entity in those auctions. The most critical
15 question asked by the Court and admitted to by the
16 defendants in their summary of bullet points, they listed
17 out and the Court seized on, was the fact that this these
18 supposed joint venture partners held themselves out as
19 independent competitors and bid separately during the
20 auctions where they were supposed to be competing.

21 THE COURT: We'll come back to that because that
22 relates to another motion, but again, I'm not sure it goes
23 to whether there's a single entity, but I gather it's your
24 witness because you produced the 302. The fellow from the
25 bank, and it was reviewed by him and by presumably bank loan

1 officers and maybe the board. Why wasn't -- I'm not sure it
2 cuts, I don't quite understand why it didn't stand out as a
3 red flag to Provident that this was illegal bid rigging.

4 MR. TERZAKEN: Well, the statements they're
5 referring to, coming out of certain of the bank papers and
6 the 302, was the description from this individual of the
7 information that was relayed to him, or representations that
8 were made during the course of the discussion. Ultimately
9 though, the funding was for the specific individual
10 competitors, not for any partnership. So to the extent that
11 he put a word like "partnership" or "teamed up," or
12 otherwise described it in a way that he didn't believe it
13 was criminal conduct, does not prove the existence of any
14 formal business relationship, when there is no other indicia
15 of the fact this formal business relationship ever existed.

16 THE COURT: You know, maybe the simple way, I
17 guess even if he did -- even if he did think it was illegal,
18 so what? If you accept that the fact of the disclosure --
19 the fact of disclosure to a third party of exactly what was
20 going on could be deemed an indicium that the parties to the
21 agreement considered to be a legitimate partnership. It
22 could be because you don't go around disclosing to third
23 parties things which you think to be illegal.

24 MR. TERZAKEN: One other -- I guess one other
25 point to consider is, in that particular disclosure we're

1 not talking about the breadth of all the co-conspirators who
2 are alleged to have participated here. I mean, that covers
3 Steve Berman. And take what you will from that disclosure.
4 And I think it will be well-proven before the Court that
5 that particular discussion has no bearing on whether or not
6 there was a formal business relationship here.

7 But where is the discussion about John Rieff and
8 his company. Where is the discussion about Jay Dackman and
9 his company, and others, there is none. Those individuals
10 stand out there as independent co-conspirators even beyond
11 Steven Berman, who's pled guilty in this case. All of whom
12 say there was no joint venture, no partnership, have
13 admitted to the bid rigging count. And are going to testify
14 to that at this trial.

15 I mean the issue that we have here boils really
16 down to the confusion that this issue is going to lend to
17 this jury. This is, as the Court knows, a run of the mill
18 bid rigging case. It is a straight forward conspiracy among
19 these defendants, and multiple of their other competitors to
20 sit down in advance of auctions, out cry and otherwise, to
21 predetermine who the winner of that is going to be. And
22 they did that holding themselves out as independent
23 competitors.

24 THE COURT: That's leads to -- I realize we're --
25 but we are going to run out of time. There's a motion, I

1 forget which one it is, but I think it's by you all in
2 limine to keep out statements that were made prior to a
3 certain time the change of the law, or something of that
4 nature. It goes to the question of whether the public
5 municipalities or counties knew what was going on. So could
6 you flesh that out for me a little bit.

7 MR. TERZAKEN: Sure. Just to clarify for the
8 Court, what we're talking about there is the indictment
9 charges 2002 forward. And the auctions that we're talking
10 about that we've moved to preclude those statements's are
11 from the auctions prior to 2002. And the reason why is
12 those auctions were conducted under far different rules than
13 the actual auctions that are the subject of the indictment.
14 The reason why is because the law changed.

15 And the law changed for exactly the reasons that
16 Mr. Sandler discussed with you. That is, prior to that time
17 period, the tax lien's auctions were set up in a way that
18 allowed bidders to bid infinity. That is because it goes to
19 the highest bidder, they'll say I'll bid to the sky's limit
20 just to win that tax lien. And that wasn't helpful to the
21 auctions, to the state, the municipalities who were putting
22 on these auctions because they couldn't determine the winner
23 of the bid. So in those circumstances where everyone bid
24 infinity, there were circumstances in which, at least
25 allegedly, there were discussions about, well, we've got to

1 figure out who the winner here is, so let's pick a winner.
2 And maybe there were discussions that occurred in that
3 context.

4 The law was specifically changed to encourage
5 competition prior to the charging period in the indictment.
6 Where the law was passed that that infinity rule no longer
7 applied. This is where you get into the high bid premium
8 and the formulas that Mr. Sandler was talking about. So
9 with respect to any of this condoning, if you will, of this
10 behavior, that is all preindictment period under far
11 different circumstances than the auctions post-indictment
12 period were conducted.

13 THE COURT: So you're aware that no evidence of
14 condoning the activity after the change in the law.

15 MR. TERZAKEN: That's correct.

16 THE COURT: And your position is even if it were
17 condoned it would be irrelevant?

18 MR. TERZAKEN: That's correct.

19 THE COURT: Okay.

20 MR. TERZAKEN: Your Honor, this is also some --

21 THE COURT: Except if there was condoning it would
22 cut into at least the atmospheric argument, look, these
23 people were holding themselves out to be competitors, when
24 in fact they weren't, if in fact it was evidence of
25 condonation, to some extent that atmosphere is undermined.

1 MR. TERZAKEN: That's true. Although, again, the
2 argument here is notwithstanding what statements they may
3 have ultimately made, those statements are irrelevant as to
4 whether or not these individuals reached an agreement to rig
5 those particular auctions. I mean, at base, as the Court
6 well understands and has understood early in these
7 discussions, this is a per se case. The intent, the crime
8 itself, everything gets wrapped into whether or not an
9 agreement was reached between these defendants in advance of
10 these auctions to predetermine the outcome of them. Because
11 they should have been independently competing. That's what
12 the issue is here.

13 And now what they want to infuse into this case is
14 this broad label. And you see it already in the paper that
15 they're submitting to the Court. Right away the expert
16 calls this a joint venture, right. That's the label we've
17 put on it. And it's only a joint venture after the fact as
18 contrived by that expert through a number of logical steps
19 and other things.

20 THE COURT: Well, I would assume every bid rigging
21 is a joint venture.

22 MR. TERZAKEN: Well, it sure is. It's a very
23 excellent, well-oiled collaboration among competitors that
24 has an anticompetitive effect. A partnership in crime my
25 colleague mentions.

1 THE COURT: Exactly.

2 MR. TERZAKEN: Which is exactly correct. But we
3 return, I think, to the very point the Court started with,
4 and I think exactly identifies the issue here, and that is,
5 were the Court to accept and allow this defense to go
6 forward, the Court would essentially be turning the
7 antitrust laws on its head. It would open the door for
8 every single partnership in crime, every conspiracy, to come
9 in and say, well, we were working together very well, jury
10 you should not find us guilty because we were so efficient
11 in what we did. That would eviscerate the meaning of the
12 antitrust laws and their impact on the economy.

13 Your Honor, there are additional points that
14 were --

15 THE COURT: It would make John D. Rockefeller a
16 very happy man.

17 MR. TERZAKEN: What's that?

18 THE COURT: It would make John D. Rockefeller a
19 very happy man, or maybe Bill Gates.

20 MR. TERZAKEN: Certainly wouldn't be good for my
21 employment.

22 The other issues that the defendants have raised
23 in their papers, and I don't know how far the Court wants to
24 go into these, because the defendant hasn't raised these per
25 se, but that is they've alternatively argued that even if

1 this single entity defense is foreclosed by the Court, that
2 they should be allowed to bring in this evidence for
3 purposes of negating the defendants' intent, which the case
4 law doesn't support. There isn't a single case cited by the
5 defendant which stands for that proposition. The case law
6 is clear that under a per se offense the intent -- the
7 knowledge of the individual engaging in the agreement itself
8 is in fact the intent. It's a general intent crime. And,
9 therefore, any suggestion they would bring in any of this
10 evidence, even notwithstanding the existence of any single
11 entity defense, for purposes of intent, would be completely
12 inappropriate. Altern --

13 THE COURT: Go ahead.

14 MR. TERZAKEN: Alternatively, the other argument
15 they've made is this argument about converting this case
16 from a per se case to a rule of reason case. And we just
17 want to make sure that the Court is clear, if it isn't clear
18 under our papers, that under no circumstances would this
19 case be converted from a per se case to a rule of reason
20 case. Even assuming, which is a huge assuming in this
21 particular case, they could make out the single entity
22 defense and were allowed to proceed on it, this case still
23 remains a per se case. Every case cited by the United
24 States is the prevailing law, that is *Palmer*, and *Addamax*,
25 and *Engine Specialties*, and the others cited by the United

1 States. Which the question in the case, where a couple is
2 able to bring a valid single entity defense, becomes whether
3 or not the purpose for forming that single entity was to
4 restrain competition. That is whether or not that entity
5 was a sham. That's the ultimate ruling in that case.

6 THE COURT: As I understand Mr. Sandler's
7 position, the way you would back door this into is a rule of
8 reason case, because he would -- I understand him to say one
9 of the reasons that it was a single entity was because the
10 participants believed it was procompetitive. So, therefore,
11 there would be evidence in front of the jury about the
12 alleged procompetitive nature of the activity.

13 MR. TERZAKEN: But it still wouldn't -- that
14 procompetitive benefits -- this is an additional point,
15 should we get that far, I anticipate the United States will
16 want to have additional discussions with the Court about
17 what the boundaries would be of the kinds of evidence that
18 could be brought in to prove a single entity defense.
19 Because a single entity defense again, is restricted to
20 trying to determine whether or not there's sufficient
21 economic integration between the parties to any supposed
22 formal business relationship. It's not about demonstrating
23 the procompetitive benefits.

24 THE COURT: Another way of saying that, and again,
25 I haven't read the cases, I'll assume you're telling me that

1 in the cases which have recognized a single entity defense,
2 it has not been an element the participants thought it was
3 procompetitive.

4 MR. TERZAKEN: Because it doesn't go to their
5 intent. It doesn't matter --

6 THE COURT: It doesn't matter, because what you'd
7 have to establish would be that there was a pre-existing
8 formal business relationship.

9 MR. TERZAKEN: Pre-existing formal business
10 relationship. And then even, the next threshold, which is
11 really the question, if a question ever went to the jury, is
12 whether the parties to that formal business relationship
13 were so integrated, that is in their operation, in their
14 conduct, that they should be considered to be a single
15 entity. That's the question. We don't get to that question
16 ever in this case because there's no basic factual
17 predicate.

18 Again, there is no case that has been cited by the
19 defendants, and certainly none cited by the United States,
20 or that the United States is aware of, where a theory has
21 been put forward that you could prove a single entity
22 defense in the absence of a pre-existing formal business
23 relationship by merely stating at the end of the conduct,
24 oh, by the way, you can consider our bid rigging conspiracy
25 to be a formal business relationship because we were very

1 efficient at it. Those are two very different questions.

2 THE COURT: Okay. Why don't we -- and I realize
3 that -- I'll let Mr. Sandler respond, but to be efficient, I
4 realize this may not -- since you're on your feet, there may
5 be other people who are going to speak to the various
6 motions. Let's go through these motions one by one now.

7 MR. TERZAKEN: Sure.

8 THE COURT: Okay. We've got your motion in limine
9 to preclude evidence or arguments that the defendants were
10 acting as a joint venture. That, I assume, we have
11 discussed.

12 MR. TERZAKEN: I believe that's correct, yes, Your
13 Honor.

14 THE COURT: Now we have Mr. Nusbaum's motion in
15 limine to present evidence showing intent to form a single
16 entity, we've discussed that.

17 MR. TERZAKEN: Yes, Your Honor.

18 THE COURT: Now we have the United States' motion
19 in limine to preclude expert testimony and compel expert
20 disclosure, that all relates to the single entity. Is there
21 anything else in that?

22 MR. TERZAKEN: It does, Your Honor. There are
23 some individual points that are made by the government in
24 addition to stating --

25 THE COURT: Are you the one who's going to argue

1 that or somebody else?

2 MR. TERZAKEN: Yes, Your Honor.

3 THE COURT: Okay. Tell me about that.

4 MR. TERZAKEN: That particular motion we're
5 focused on the notice of disclosures made by the defendants
6 as to what experts they would call. And they teed up a
7 number of those experts. We honed in specifically on the
8 single-entity-type experts that were being proffered. Our
9 first argument in that regard is no different than all the
10 facts we've been talking about and arguments we've been
11 talking about here today, that is if there is no factual
12 predicate for the defense there is no defense and no need to
13 be calling any experts because that testimony is otherwise
14 irrelevant and prejudicial.

15 Further, to that, we've also argued that in the
16 event that expert should be called that there are additional
17 things identified in the proffer as to what that expert
18 would testify to that are inappropriate. First and
19 foremost, that he would conclude, for example, come to the
20 legal conclusion on the stand, that all of the market
21 factors at issue here constituted a joint venture. That
22 conclusion is a conclusion as a matter of law. And he can't
23 make that legal conclusion.

24 And we've cited the case of *McIver* is the
25 governing case there. And we've distinguished *Garrett* and

1 Karns, which were the cases that were cited by the defendant
2 for purposes of calling an expert to conclude as a matter of
3 law on an inquiry where that particular term, that is a
4 joint venture, has a legal meaning other than that
5 understood by the average layperson.

6 Further to that we've also argued against that
7 particular expert testifying as to the intent of these
8 particular defendants. Defendants have suggested they may
9 back door their defendant's testimony into this case by
10 having this expert testify what Mr. Nusbaum or Mr. Stollof
11 intended for purposes of their actions. That's
12 inappropriate, not only because intent is irrelevant in this
13 particular case, but it's specifically excluded by the
14 Federal Rules of Evidence under Rule 704.

15 Finally, there is a broader aspect beyond simply
16 the single entity expert, which really bears more on
17 Defendant Stollof's motion to call a medical expert who
18 would purport to testify that at certain times Mr. Stollof
19 had to go to medical appointments or other things, which may
20 have meant that he didn't appear at certain meetings, that
21 may ultimately come up as part of the testimony. We've
22 argued against introduction of that evidence on a number of
23 grounds, but first and foremost, that it's entirely
24 prejudicial and unnecessary. The probative value that the
25 man went out to doctor's appointment versus its prejudicial

1 value of his particular health is great here. And we think
2 it should be excluded on that ground.

3 Second, they haven't properly noticed under Rule
4 12.2B that this particular expert is going to be testifying
5 to any mental capacity of Mr. Stollof to engage in that
6 agreement. If that's what they're intending to do here,
7 they failed to make that appropriate notice both to the
8 United States and to the Court, and should be precluded from
9 doing so. Finally, I would just state for the record that
10 our motion to preclude that particular expert stands
11 unopposed by Defendant Stollof.

12 THE COURT: United States motion in limine to
13 preclude introduction of improper evidence or argument. Is
14 there anything in that which is not related to the single
15 entity?

16 MR. TERZAKEN: Yes, there is, Your Honor.

17 THE COURT: And I gather Ms. McMillen is going to
18 address that.

19 MR. TERZAKEN: Yes, Your Honor.

20 THE COURT: Ms. McMillen?

21 MR. SANDLER: Could I short circuit this by
22 pledging not to argue anything that's improper?

23 THE COURT: I know you wouldn't, so you don't need
24 to proffer that.

25 MS. McMILLEN: We have several in limine motions,

1 Your Honor. With respect to the one I believe you're
2 talking about, it had -- there was several elements to that
3 motion. One of which was that the defendants be precluded
4 from introducing any evidence as to whether or not anyone,
5 the defendants or others, believed that what they were doing
6 was perfectly permissible or legal. We believe that that
7 sort of testimony is classic lay witness opinion testimony
8 about a legal conclusion and should be precluded on those
9 grounds alone.

10 THE COURT: It also is immaterial, I gather.

11 MS. McMILLEN: It's absolutely immaterial since
12 it's a general intent crime. And what they believed --
13 whether they believed they were doing something legal was --
14 is irrelevant totally. This is also the motion that touches
15 on evidence of government officials having been aware of or
16 having condoned the activity, which I think you've talked
17 to -- or Mr. Terzaken has dealt with. If there's anything
18 else you would like to know about that one, I would be glad
19 to address it.

20 Would you like to touch on the other in limine
21 motions that we've --

22 THE COURT: Sure. Tell me which one you want to
23 address next.

24 MS. McMILLEN: -- jury nullification.

25 THE COURT: Which one do you want to address next?

1 MS. McMILLEN: We have a motion dealing with jury
2 nullification, which is our docket number 50. And the
3 defendant's responses are 91 and 95.

4 THE COURT: Right.

5 MS. McMILLEN: Specifically there, the first of
6 those in limine motions is to exclude any evidence and
7 arguments that the rigged bids were reasonable, or that the
8 conspiracy caused little or no harm. And the reason that
9 we're moving to exclude that sort of evidence is because in
10 a per se case, obviously, those things are irrelevant and
11 would be prejudicial if brought in. Defendant Stollof
12 concedes that our position is correct, but argues that the
13 motion is too broad, argues that it would preclude any
14 mention of prices or yields or amounts paid for liens, and
15 that's not what our motion would do.

16 He also rightly states that a defendant should be
17 entitled to present evidence of prices to prove that the
18 prices in a particular auction were inconsistent with a big
19 rigging agreement. We generally agree with that legal
20 proposition. Although we might disagree with how it is
21 done. However, to the extent Mr. Stollof wishes to
22 introduce this evidence through any sort of expert witness,
23 we don't believe that they noticed us of that in their
24 September 11th filing of areas of expert testimony.

25 Defendant Nusbaum objects to the notion on the

1 grounds that the reasonableness of prices and lack of
2 economic harm is relevant and admissible with respect to his
3 single entity defense. And I think we've fully dealt with
4 that. So I will -- I won't go into it.

5 Second part of that motion deals with moving --
6 the United States has moved to exclude evidence or argument
7 as to age, illness or financial condition, circumstances
8 that is. Obviously the defendants are both in their 70s,
9 they have various physical --

10 THE COURT: That's not obvious to me.

11 DEFENDANT STOLLOF: Thank you.

12 MS. McMILLEN: I think we were told that at one
13 point on the record, Your Honor. We've moved to exclude
14 evidence of age and ill health because of lack of --

15 THE COURT: I understand.

16 MS. McMILLEN: Can I move on from that one, Your
17 Honor?

18 THE COURT: Beg your pardon? Yes, you may.

19 MS. McMILLEN: And the last deals with financial
20 condition.

21 THE COURT: The various things about penalties and
22 charging decisions you need not address those.

23 MS. McMILLEN: Thank you very much, Your Honor.
24 We also had an in limine motion to exclude advice of counsel
25 defense. And I believe I've touched on that already in

1 terms of our earlier motion to exclude any discussions about
2 whether or not what the defendants were doing was right or
3 correct or not illegal. And basically for those same
4 reasons we would -- we would seek to exclude it here too.

5 THE COURT: Okay. What's next?

6 MS. McMILLEN: I believe that's all that I have
7 for you, Your Honor.

8 THE COURT: Okay. Mr. Terzaken, what do you want
9 to argue next? I just want to go through all of these, make
10 sure we cover them all.

11 MR. TERZAKEN: Your Honor, there are a number of
12 other motions that were made, they're all motions that were
13 made by the defense.

14 THE COURT: Okay. Let me hear your position on
15 them.

16 MR. TERZAKEN: I have to concede to my co-counsel.

17 THE COURT: Okay. I think we have the defendants'
18 motion for failure to allege a single conspiracy and lack of
19 jurisdiction.

20 MR. TERZAKEN: Mr. Grundvig is going to address
21 that argument, Your Honor.

22 MR. GRUNDTVIG: If I could, Your Honor, I'll
23 address both the motion to dismiss the indictment for
24 failure to allege a single conspiracy, along with their
25 similar motion to dismiss the indictment for failure to

1 state sufficient subject matter jurisdiction. Our response
2 was the same to both, or they dealt with both of those
3 issues the same.

4 I think as a -- I guess as a starting point, the
5 burden to dismiss an indictment is high because essentially
6 all that the government has to allege are the elements of
7 the offense sufficiently to put the defendants on notice,
8 and such that they can also object to a future prosecution
9 for the same offense. And I think without question the
10 indictment has done that in this case. I think essentially
11 they are confusing a sufficient allegations in an indictment
12 to bring an offense versus the evidence necessary to prove
13 beyond a reasonable doubt commission of the offense at
14 trial. But I can certainly get into the specifics of those
15 if you'd like.

16 But taking on first the subject matter
17 jurisdiction, the indictment at paragraphs 9 and 10 is --
18 couldn't be clearer. The paragraph 10 in particular --

19 THE COURT: Actually, I'll hear from the
20 defendants. If there's something I need after hearing from
21 them I'll --

22 MR. GRUNDTVIG: That makes sense, Your Honor.

23 THE COURT: Again, I'll hear from -- go ahead, Mr.
24 Terzaken.

25 MR. TERZAKEN: Your Honor, in terms of the

1 remaining motions the Court can certainly hear from the
2 defendants as to which of those motions they'd like to
3 argue. I think the Court may have indicated you would like
4 to hear from the United States on the grand jury subpoenas
5 issue -- I mean, trial subpoenas.

6 THE COURT: Trial subpoenas.

7 MR. TERZAKEN: We're happy --

8 THE COURT: It would seem to me, I mean my -- it
9 would seem to me that to some extent the propriety of the
10 trial subpoenas is going to depend upon my ruling upon the
11 single entity defense, at least it's going to inform some.
12 But to the extent that my ruling allowed that motion to go
13 forward, I guess my -- to the extent that the complaint was
14 that the subpoenas were overburdensome, that was an argument
15 to be made by the recipients of the subpoenas not by the
16 government. But I'll hear from you or from whoever's going
17 to address it.

18 MR. TERZAKEN: Thank you, Your Honor. Mr. Bester
19 is going to address it.

20 MR. BESTER: Thank you Your Honor, I understand
21 from the telephone conference the other day that you had
22 some concerns about standing, whether the United States had
23 standing --

24 THE COURT: It wasn't so much formal standing, it
25 was just about who was best to make the arguments. But go

1 ahead.

2 MR. BESTER: I wanted to just point out to the
3 Court that although it wasn't addressed in the papers there
4 certainly are District Courts that have found that the
5 United States has standing when considering the issuance of
6 pretrial subpoenas. The *United States versus Wittig* and
7 *United States versus Beckford* both found that the United
8 States has standing when a motion has properly been filed
9 with the Court. As a party to litigation the United States
10 has standing to come forward and raise its objections.

11 In that *Wittig* case, though, the Court while it
12 found that the United States had standing, it said that it's
13 a nonissue. As Your Honor's well aware, ultimately you have
14 the authority and responsibility to make sure that Rule 17,
15 and the case law that flows from it, is adhered to. And
16 that the subpoenas that are issued comply -- comport with
17 those requirements. Here, the subpoenas, as Your Honor has
18 made note, mainly seem to be concerned with the single
19 entity defense. And depending on Your Honor's ruling on
20 that issue, I think will inform the issuance of these
21 pretrial subpoenas.

22 But to the extent they don't, to us these
23 subpoenas look like a fishing expedition. The language
24 contained in those requests is very vague. It asks for any
25 and all documents. It's asking for personnel records.

1 Those seem to me to be much more like civil discovery
2 requests rather than a pretrial subpoena in a criminal
3 matter. As you're well aware, the *Nixon* case governs these
4 issues. And the requirements of *Nixon* must be met before
5 Rule 17 subpoenas can be issued. And those requirements are
6 that the -- the subjects in those subpoenas must be
7 relevant, admissible and specific. And I would submit that
8 the subpoenas issued here, or proposed to be issued here, do
9 not meet those factors.

10 The Court was very clear that rule 17 cannot be
11 used as a discovery device. That the Rule 17 subpoenas need
12 to be much more narrowly tailored than a common discovery
13 tool. In *Nixon* the prosecutors were seeking specific tapes
14 with specific conversations on them. The prosecutors were
15 able to identify the time, the place and the participants in
16 those conversations that they were seeking. By contrast
17 here, the request for documents seem to be much, much
18 broader. They don't specify the recipients. They don't
19 specify the dates. And for those reasons it appears that
20 this is much more of a fishing expedition than a narrowly
21 tailored request for documents pretrial.

22 Further, the defendants have much of this material
23 already. We have produced a great volume of information
24 back in July. And there is no mention in any of the papers
25 by the defendants of whether the recipients of these

1 proposed subpoenas have -- they have produced this, they've
2 seen it already, we don't know. At a minimum the defendant
3 should be required to tell the Court which of the material
4 they already have before going and asking these subpoena
5 recipients for the same information again.

6 There's other information that appears wholly
7 irrelevant to the matters of this case. There are requests
8 for materials for internal investigations. There's
9 material, as Your Honor is aware, seeking materials for
10 joint ventures and whether there was a joint venture. As
11 you've heard today there is no joint venture in this matter.
12 And, therefore, documents requesting materials related to a
13 joint venture are simply a red herring here.

14 The internal investigation documents sought,
15 again, are irrelevant to the consideration of the issues in
16 this case. As for the proposed subpoenas directed at the
17 municipalities, this is material, as I mentioned, that at
18 least it appears from the way that those requests are
19 phrased here, and the materials already produced to them
20 over the summer that they is have much if not all the
21 information that was requested there. So for those reasons
22 I would urge the Court to block the issuance of these
23 subpoenas.

24 THE COURT: Okay. And, again, I realize they're
25 defense motions, but since the government's on its feet.

1 The motion by Mr. Nusbaum to exclude the admission of
2 alleged co-conspirator statements absent a pretrial showing.
3 Isn't that just governed by 4th Circuit law?

4 MR. GRUNDTVIG: It is, Your Honor.

5 THE COURT: Okay. I'll ask Mr. Sandler about
6 that.

7 MR. GRUNDTVIG: I think this issue is largely moot,
8 we've produced the 302s and the interview memoranda to the
9 defendants.

10 MR. SANDLER: We agree.

11 THE COURT: Okay. So that's moot. I'll deny that
12 one as moot. How about the use of guilty pleas and plea
13 agreements?

14 MR. GRUNDTVIG: Your Honor, we're certainly happy
15 to stand on the papers that have been filed. It's fairly
16 clear law on that. We can address any questions you might
17 have.

18 THE COURT: Frankly, I thought I had read all
19 these. I haven't read this.

20 MR. SANDLER: We'll defer on the papers.

21 THE COURT: Yeah, let's defer. I'll deny it
22 without -- I'll deny it subject to being renewed at trial.

23 MR. SANDLER: Well --

24 THE COURT: I mean, the fact of the matter is plea
25 agreements are going to come in -- evidence about plea

1 agreements is going to come in. I tend not to allow plea
2 agreements themselves into evidence, different judges have
3 different practices. I tend not to do it because, if for no
4 other reason, plea agreements contain statement of facts
5 which I don't think ought to be back in the jury room
6 because they're, you know, by virtue of the fact that the
7 defendant pled guilty they're pro-government. Another way
8 to do that is to redact that. But that's something you can
9 -- that to me is a trial issue.

10 MR. GRUNDTVIG: And maybe slightly separate
11 question is the defendant that raises this motion is seeking
12 to allow himself to introduce the existence of a plea. To
13 preclude the government from doing it in direct
14 examination --

15 THE COURT: I'm not going to let them do that. I
16 understand the position, but it's established practice that
17 the government can produce evidence in its own examination
18 of its cooperators that that person is a cooperator. You
19 can certainly cross-examine. I'm going to go with
20 established practice on that.

21 MR. GRUNDTVIG: Thank you, Your Honor.

22 THE COURT: So it's denied. But is there any --
23 it's denied without prejudice being renewed. I just see it
24 as a trial -- you know what I'm going to rule.

25 I'm going to deny as moot the motion to exclude

1 evidence of income, assets and financial means, but also
2 because the government's not going to try to put that in.

3 MR. TREEM: Your Honor, do I infer correctly that
4 you're going to deny the defense the opportunity to elicit
5 that kind of information in cross, perhaps.

6 THE COURT: Of Mr. Nusbaum?

7 MR. TREEM: Of either on behalf of Mr. -- on
8 behalf of Mr. Stollof, I can't speak for Mr. Nusbaum.

9 THE COURT: But this is Mr. Nusbaum's motion to
10 exclude evidence of income asset -- I assumed that was Mr.
11 Nusbaum's.

12 MR. TREEM: Fine, as long as that's limited to Mr.
13 Nusbaum that's fine. Because we don't -- because we have an
14 interest in that evidence on behalf of Mr. Stollof coming
15 in, at least to some extent. And I'd like to at some point
16 address that.

17 THE COURT: As to Mr. Nusbaum?

18 MR. TREEM: No, it's Mr. Stollof, Your Honor.
19 Thank you.

20 THE COURT: This motion I understood to be related
21 to Mr. Nusbaum.

22 MR. CRALLE: Your Honor, part of this is moot.
23 But as to the income that is not. And if you would like to
24 hear that, we'd be happy to address it.

25 THE COURT: I'm going to deny it without prejudice

1 to being renewed. This really is a trial issue. When I say
2 -- it's generally without prejudice. I mean, it doesn't
3 make any sense for me to decide it now. Compel disclosure
4 of confidential witnesses.

5 MR. SANDLER: It's moot, Your Honor.

6 THE COURT: It's moot. Denied as moot.
7 Inspection complete FBI 302 reports.

8 MR. SANDLER: Moot.

9 THE COURT: Moot. For leave to file additional
10 motions. If after today anybody wants to file an additional
11 motion, they can file an additional motion, it's a free
12 country. 404(b) evidence and any alleged acts falling
13 outside the statute of limitations. Who wants to address
14 that? I don't remember what the issues are. I read this
15 once. I don't remember what the issues are.

16 MR. CRALLE: I'd be happy to address it, but as
17 we've said we're not aware of any 404(b) evidence. To the
18 extent we become aware of it we'll give reasonable notice.

19 THE COURT: If you don't let them know about it,
20 you can't introduce it. So that's an easy one. Rule of
21 inclusion as it is.

22 All right. Let me hear from any defendant on any
23 of the motions, either rebuttal on the single entity, or any
24 of the other motions they want to address.

25 MR. SANDLER: May it please the Court, I thought I

1 would do the rebuttal and certainly Mr. Treem can then
2 articulate what he wishes.

3 THE COURT: Absolutely.

4 MR. SANDLER: I am not going to reargue, that's
5 not the purpose of rebuttal. But I am going to point out to
6 you some issues that we do think are incorrect. And remind
7 the Court that the document that I handed, I would like to
8 have it marked as motion Exhibit 1. And when Mr. Esworthy
9 brought it forth, we didn't state that. Will you accept it
10 as Exhibit 1?

11 THE COURT: Yes.

12 MR. SANDLER: Thank you. And should I, after the
13 Court should I mark it with the label because we didn't do
14 that.

15 THE COURT: Well, Martina's not here, Ben can you
16 get a -- I'm going to take one with me too, so if you've got
17 an extra copy give one to Ben to be marked.

18 MR. SANDLER: Yes. And I also, if you noted,
19 Exhibit 1 is preliminary proffer, because when we spoke on
20 Wednesday and I saw the direction, which I welcome, in which
21 we were going, it was not possible for me to bring my expert
22 witnesses here. One is in South America. One is not -- the
23 other's not available. But I would suggest to you that
24 before you conclusively send the piercing arrow to the heart
25 of the defense, that you consider the balance of the

1 proffer.

2 And I point out to you, I once read this comment
3 by Schopenhauer, I don't know if it's applicable, but he
4 described the difference between brilliance and genius. He
5 said that a brilliant person could take an arrow, aim it at
6 a target and hit the bull's eye that no one else could. He
7 said, the genius can aim the arrow at the target that no one
8 else can see and hit it. I'm neither brilliant or a genius,
9 just a trial lawyer taking the facts and applying the law.
10 And the first point that I dispute with the government is
11 that when they talk about other co-conspirators and no
12 agreements, that is incorrect. There are 302s that have
13 other agreements acknowledged by co-conspirators. And one
14 of them is even in writing. So I attribute that just to
15 oversight.

16 I also point out to Your Honor that much -- I'm
17 talking about DeLaurentis, and Rieff, Counsel. I also point
18 out, with all respect, that much of what the government
19 presented by way of its reply supports the position of the
20 defendant. And was speculative and argumentative in terms
21 of how the case could come out, to try to go -- it goes to
22 the weight and not the admissibility of what I seek to
23 present. Remember, my threshold, I respectfully suggest, is
24 very little. And the case law is clear that these issues
25 are for a jury. That's my interpretation of the cases, the

1 *Continental Baking Company* case is one that's specific in
2 that regard. And there are others that I suggested.

3 But now let's go to the heart of my rebuttal,
4 which will be brief. The government which you -- which I
5 understood and could never doubt, acknowledges the validity
6 of the single entity defense. There's nothing more to say.
7 So when I began with you at the very beginning, couple of
8 hours, and once again, we all appreciate your patience and
9 courtesy. When I began --

10 THE COURT: You alluded as though that was
11 unexpected.

12 MR. SANDLER: Well, it's always expected in my
13 experience.

14 THE COURT: Go ahead.

15 MR. SANDLER: It's always expected in my
16 experience, Your Honor. But on the other hand, when I know
17 Your Honor has made up his mind --

18 THE COURT: I haven't made up my mind. I just
19 wanted exactly what you've given me today.

20 MR. SANDLER: Now, when I talked to you at the
21 very beginning, I suggested to you that we would show the
22 elements of the single entity unit, which in this case was a
23 joint venture. And I suggested to you at the beginning that
24 I was going to appeal to your logic, not emotion, not
25 passion, but what Aristotle called logos, pure logic,

1 deductive analysis, major premise, minor premise and
2 conclusion. The major premise has been conceded by the
3 government. Single entity is a defense to the bid rigging
4 case, which really dispels some of your concern about
5 sending antitrust law on its head, because it's already
6 acknowledge, and of course it's acknowledged because that's
7 the law.

8 So the only question that -- in terms of this
9 proffer that we need to wrestle with is whether the minor
10 premise flows. And the minor premise is that the single
11 entity is exhibited by the conduct of these individuals.
12 Now, what the government does is really interesting, they
13 talk about where's the formal agreement, where's the formal
14 writing, but under RUPA that's certainly not even required.
15 What's RUPA? RUPA is the Revised Uniform Partnership Act
16 that's followed by Maryland. And my expert, Mr. Booth, in
17 the tab gives some explanation of that, but it's not the
18 full report. I'd like to --

19 THE COURT: I don't want to be overly simplistic,
20 but isn't it as simple as, where is there any evidence of a
21 joint venture other than the engaging in the bid rigging? I
22 mean, it really is as simple as that. I mean, in the other
23 cases there is evidence of a relationship, I mean, that's
24 what this is all about. I'll go back and read your proffer,
25 but it seems to me that -- that seems to me is the issue,

1 there has to be a joint venture other than the illegal
2 agreement.

3 MR. SANDLER: Well, I share with you what that is,
4 I'll repeat it.

5 THE COURT: No, we've been over that. I'm going
6 to read it, but I --

7 MR. SANDLER: I'm not going to read it. You can
8 look in the proffer book. They have those elements. They
9 shared the profits, they shared the risk, they meet the --

10 THE COURT: They shared the risk of the --

11 MR. SANDLER: Sure, they put up -- they each put
12 up their money. They each brought \$20 million to the table.
13 They each relied on each other. They shared the risk of
14 getting the bids, not getting the liens --

15 THE COURT: That's all inherent to the bid
16 rigging.

17 MR. SANDLER: It's all inherent to the joint
18 venture.

19 THE COURT: Which is the bid rigging.

20 MR. SANDLER: Not if it's econ -- a bid rigging --
21 I would say the anecdote to bid rigging is whether or not
22 the relationship generated the efficiencies of economy. And
23 those efficiencies of economy are crucial. Under your
24 thinking --

25 THE COURT: But that's where you're turning

1 antitrust law on its head, because then you're turning every
2 per se case into a rule of reason case, because you're
3 allowing a defense to be proffered that this was
4 procompetitive, and so therefore, it's not actionable. And
5 that's why this is not just a jury determination, it's a
6 question of law. The law is clear, right or wrong, that
7 there are certain kinds of activities which are per se
8 illegal even if they're procompetitive.

9 MR. SANDLER: I'm not asking that, though. I
10 agree with the government that the procompetitiveness is not
11 the aspect of the joint venture, it's the result. But you
12 first have to have the valid joint venture. You first must
13 have the economic efficiencies. Here's what the government
14 in their brief claims, by the way, I think this should be of
15 interest to you, respectfully. Says in order to have this
16 joint venture, to show a joint venture -- I'm quoting on
17 page 3 of their response in limine to preclude evidence of
18 the joint venture. They say that to show a joint venture in
19 the absence of a written agreement, so they acknowledge you
20 can have a joint venture without a written agreement, you
21 have to -- you should have a proprietary interest, a pooling
22 of assets and/or capital over the subject of the
23 undertaking, and you should have joint control of the
24 undertaking. That's all you have to do.

25 And what you're trying to do is read more into

1 what's required. What's required for the joint venture is
2 minimal. And under the -- under -- I put it to you
3 respectfully, that if you share capital, if you share
4 computer consultants, if you share resources of a computer
5 software and hardware, if you share your profits, if you get
6 together and share your trade secrets with each other so
7 that you jointly can proceed and divide the profits, that's
8 a joint venture. And that's a question that's easily
9 answered. And that's for the jury to decide.

10 THE COURT: But isn't -- again, I'll read the
11 cases, and maybe I'm -- but I think Mr. Terzaken referred to
12 as a pre-existing business relationship. Another way to say
13 that is it is a joint venture extrinsic to the bid rigging
14 itself. I mean, is there any case in which, you know,
15 there's relationship between parents and subsidiaries, there
16 was a former joint venture in the Supreme Court case, there
17 is the NFL case, there's a franchise, franchisee case, I
18 assume that's what it is. There is extrinsic to the alleged
19 illegal conduct, there is an existing business relationship.

20 MR. SANDLER: No, I mean absolutely not. I mean
21 the *Texaco Dagher* case they were prior competitors and they
22 formed this other entity and they went forward. That's
23 incorrect interpretation of law I respectfully suggest. And
24 you can't criticize the government, I can't, for wanting to
25 hold firm because they recognize what they're policy -- it's

1 been -- they have a very stern policy. And they want to
2 come, you know, they run with a hammer and every nail gets
3 hit. And this is one of them, in my interpretation, based
4 on these facts, which I'd like to present to the jury.

5 It's important to know that I do not think the
6 procompetitive impact is part of the economic efficiency.
7 What I'm saying to you is you need the joint venture, you
8 need the economic efficiencies, and you need the
9 procompetitive impact. And that's why every bid rigging is
10 not a joint venture. You can't do that in 99.9 percent.
11 First of all, most of the bid riggings are lower, not
12 higher. Most of the bid riggings aren't open to the world.
13 This is a very unique case.

14 And I respectfully point out to the Court,
15 synopsis to the Court, I must have looked at hundreds of
16 cases and hours of studying trying to find precedent. There
17 is none. So I'm out here in almost a case of first
18 impression in this regard. But please do not fail to
19 consider the logic that I'm trying to present to you. If
20 all the -- ask yourself one question, if this were a common
21 law case that we were in civil court in the state of
22 Maryland, and say it went up on appeal, the Court of Special
23 Appeals, and Judge Hollander, for example, was looking at
24 this, would she analyze -- if this were just a joint
25 venture, could she find if expert testimony was helpful to

1 explain this to you or to the jury that this relationship
2 constituted a joint venture.

3 Because if you say to yourself that under no
4 circumstances, giving it the best light to me, all I said to
5 you in terms of the sharing, the drawing the capital
6 together the resources, the computer experts, sharing the
7 messenger, dividing the profits. In one instance which I
8 showed you, one got zero the other then equalized. If
9 you're saying that under no circumstances could that be a
10 joint venture, in other words, in civil law you would say,
11 Mr. Sandler, this could never go to the jury, summary
12 judgment granted. If that's your conclusion, based on these
13 facts, I still should win, because my burden is even less in
14 this criminal case.

15 THE COURT: Let me ask you one other thing. It
16 just occurred to me, and I could be wrong about this, you
17 keep emphasizing it's already here. It's odd because the
18 rigging results in the high bidder always wins. And maybe
19 the government, I assume, maybe it's a per se violation, per
20 se violation, but the theory is that there would have been a
21 higher -- there might have been a potential higher bid,
22 because these two people were -- these people were bid
23 rigging, so there could have been still a higher bid.

24 MR. SANDLER: That's a factual issue.

25 THE COURT: I assume that's the theory of the

1 government's case. It's no answer to say, here the high
2 bidder won, the whole problem was, at least theoretically,
3 there would have been a higher bidder.

4 MR. SANDLER: Well, that's what they would say,
5 and we would of course dispute that.

6 THE COURT: I just want to make sure that I
7 understood the government's theory.

8 MR. SANDLER: I'm saying to you, we've got major
9 premise resolved, minor premise I'm saying to you that based
10 on the fact --

11 THE COURT: The major premise is conceded. I
12 understand. But let me ask the government one thing because
13 it is something which I've got to reread the case, how -- is
14 the extrinsic intrinsic distinction I'm drawing correct?
15 And if so, how does the Supreme Court -- what I'm saying is,
16 is the pre-existing relationship, is a joint venture
17 extrinsic to the alleged illegal conduct?

18 MR. TERZAKEN: The answer is I don't think a court
19 has ever said it that clearly, but it certainly can be
20 inferred in the way the case law --

21 THE COURT: How about the Supreme Court case, was
22 there any --

23 MR. TERZAKEN: The Supreme Court case wasn't
24 addressing that, because there was already a business
25 relationship.

1 THE COURT: Was there a business relationship for
2 any purpose other than the purchasing on the market?

3 MR. TERZAKEN: That was a different question, yes.
4 It was formed -- this was a formal joint venture between the
5 parent -- or sorry, between the joint venture partners, they
6 created a third entity called Equilon, which they wanted to
7 put their assets.

8 THE COURT: But did Equilon have any other purpose
9 other than --

10 MR. TERZAKEN: It was to put in the assets in to
11 jointly market these two brands of gasoline that these
12 companies were independently marketing on their own.

13 THE COURT: So they had a purpose other than
14 purchasing the fuel on the market, which was the alleged bid
15 rigging.

16 MR. TERZAKEN: The sale of the fuel, that's
17 exactly right.

18 THE COURT: If no court has said it so clearly,
19 I'm neither brilliant nor a genius, is there a valid
20 distinction between the extrinsic and the intrinsic.

21 MR. TERZAKEN: Yes. Well, let me put this way,
22 first there's no case law cited by the defendant, and none
23 the United States is aware of where this theory has ever
24 been put forward to a court. I think because it's
25 nonsensical on its face, for all the reasons we discussed,

1 that it would turn antitrust law on its head. Every case
2 that the Supreme Court or other courts have considered, were
3 exactly the kinds of pre-existing business relationships
4 that had extrinsic value beyond simply rigging bids or
5 fixing prices --

6 THE COURT: For purposes. Okay.

7 MR. TERZAKEN: For a particular purpose. Now
8 follow that on with the cases we've also cited, what happens
9 in this case, if there is in fact a formal business
10 relationship, and the defendants were then allowed to argue
11 the other factors that go into the single entity defense.
12 What the Courts have then said is, the question isn't about
13 the extrinsic parts necessarily of that organization, but
14 what the purpose was for forming it in the first instance.

15 And that's why even in the event they were allowed
16 to bring this defense, the question is whether or not they
17 label they want to put on it is a sham. That's the holding
18 of *Palmer* and *Addamax*. So I think the Court is completely
19 correct in reading exactly that fact. Because that's the
20 question you get to once you show the formal business
21 relationship is next. What was the purpose for forming it?
22 Is it a sham or was it for all these other reasons? We
23 never get out of box No. 1 to get to those latter questions.

24 MR. SANDLER: I respectfully -- I must
25 respectfully disagree with learned counsel. I have read

1 *Dagher*, I do not read it the way he reads it. I read out of
2 it, not into it. And I know that historically Texaco and
3 Shell Oil competed with one another in the national,
4 international gasoline markets. And their business was head
5 to head competitors. And they formed this business solely
6 for this joint venture, solely for this one undertaking.
7 And I say to Your Honor, it matters not in the law whether
8 there's a written formal agreement or not. And there's
9 never any discussion -- I think counsel finally conceded or
10 not -- finally recognized it, that there's no extrinsic
11 intrinsic issues in this.

12 The major premise is conceded by the government
13 because it's the law. And in terms of where I'm going now
14 in trying to wrap this up is to ask Your Honor to focus on
15 what it is to have a joint venture. It's very little. To
16 understand what the Maryland law is about joint ventures.
17 That this is a joint venture. And then the final point is
18 whether the joint venture exhibited economic efficiencies.
19 And for me to convince you of that. Even though it's not
20 the trial. Even though it's not my closing argument. I
21 need to bring the experts here. So that they can testify
22 and -- or at least produce their reports so that if the
23 government wants to examine, to demonstrate that the
24 economic efficiencies exist. Because my saying so isn't
25 enough. Because I am not an antitrust specialist.

1 THE COURT: I understand. Does any defendant want
2 to be heard on any of the other pending motions?

3 MR. SANDLER: Thank you, Your Honor.

4 MS. GALLAGHER: Your Honor, very briefly on our
5 jurisdictional motion, the failure to allege a single
6 conspiracy and the motion to dismiss for lack of
7 jurisdiction, we're going to submit on the papers. We
8 recognize that further exposition of the facts might be
9 necessary for the Court to make a final decision on those
10 issues.

11 THE COURT: Thank you.

12 MR. TREEM: And, Your Honor, just to comment or
13 respond to the government's argument that we haven't filed
14 notice of experts with respect to Mr. Stollof's illness or
15 potentially his competence. The government can infer that
16 we don't intend to call any experts with respect to that
17 particular issue. And the same with respect to the pricing
18 expert. But I do want to respond to the in limine motion
19 with respect to age, illness, financial condition.

20 The government has to prove that Mr. Stollof knew
21 the nature and scope of the agreement that they have alleged
22 that he participated in. And issues concerning his
23 knowledge, his participation, his association with other
24 co-conspirators, are very much at the heart of that. You
25 know, mere association isn't enough. And mere participation

1 without knowledge isn't enough. I mean, the threshold --
2 the threshold case of the government is that Mr. Stollof had
3 to know that he was entering into an agreement, the object
4 of which is described in the indictment.

5 And so I think it is premature, at least at this
6 stage, to cut us off at the knees without having had the
7 trial at least commence where these issues of relevance,
8 which is what really they are all about, come into play. If
9 we ask a question that the government thinks is improper,
10 then they will object and the Court will rule. And I think
11 that's --

12 THE COURT: As long as you're not suggesting that
13 if you're 70, you can't understand --

14 MR. TREEM: Oh, no, not at all, Your Honor. I'm
15 rapidly getting there. And I'd like to think that that
16 won't be the case.

17 THE COURT: Okay. I'll reserve -- to the extent
18 that it's relevancy, Mr. Treem, you know the mere fact that
19 somebody doesn't feel well or is ill or is old, you're going
20 to have a tough time with me on that, but I'll reserve
21 ruling on that.

22 MR. TREEM: Thank you, Your Honor. That's all I
23 have.

24 THE COURT: Or relatively old. All right. I'm
25 not even sure I'm going to formalize all the rulings on the

1 smaller motions. I will defer ruling on the big issue,
2 which is the joint venture issue. I'll take a look at the
3 proffer, that is what I needed to see, to make some -- to
4 put it in proper context. I'll issue an opinion. I will,
5 depending upon that ruling, I may grant the motion for the
6 third party subpoenas because obviously -- excuse me, if I
7 find -- basically if I find the single entity defense is not
8 viable, those subpoenas ought to be rethought and reissued,
9 if there's anything left to find there. So that's related.
10 But I will -- I don't expect -- I may write a long opinion,
11 I probably won't. I'll take a look at the proffer. The big
12 issue today, obviously, is whether I'm going to allow the
13 single entity defense. Thank you.

14 MR. SANDLER: May it please the Court, would it be
15 helpful, and I'm not trying to overburden the Court, would
16 it be helpful for the two expert reports --

17 THE COURT: No.

18 MR. SANDLER: It would not.

19 THE COURT: Absolutely not. Let me say it this
20 way, if I decide after reviewing the papers it would, then
21 I'll let you know.

22 MR. TERZAKEN: Your Honor, certainly no discredit
23 to defense counsel, but the United States has not had an
24 opportunity to review this supposed factual information
25 they've presented or in the form it's been presented.

1 THE COURT: If you want to submit any response to
2 it, when can you do it?

3 MR. TERZAKEN: We could certainly do it, but it
4 includes expert testimony for an expert who hasn't been
5 qualified before this court.

6 THE COURT: Don't do anything with it unless --
7 I'll take a look at it. Mr. Sandler's made a good argument.
8 I'll take a look at this. If I was going to rule from the
9 bench right now I wouldn't allow the single entity defense.

10 MR. TERZAKEN: Thank you, Your Honor.

11 MR. SANDLER: Thank you, Your Honor. I want to
12 mark officially this exhibit.

13 THE COURT: Thank you. I'm saying that only in
14 terms of guidance. If I change my mind on that, I'll give
15 you a chance to respond.

16 (The proceedings were concluded.)

17
18 I, Christine Asif, RPR, CRR, do hereby certify
19 that the foregoing is a correct transcript from the
20 stenographic record of proceedings in the above-entitled
21 matter.

22
23
24
25
_____/s/_____
Christine T. Asif
Official Court Reporter

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